Petition

NO. 81-1668

Office - Supreme Court, U.S.
FILED
MAR 8 1982
ALEXANDER L. STEVAS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

PINE BELT LAND COMPANY,
Petitioner

HATTIESBURG REALTY COMPANY,
Co-Petitioner

VERSUS

MISSISSIPPI STATE HIGHWAY COMMISSION,
and
MRS. TERRY ANDERSON CURRIE,
OVERTON A. CURRIE, DANIEL McMAHON
CURRIE, EDWARD ALEXANDER CURRIE, JR.,
CLOVERLEAF MALL, LTD., a Limited Partnership
Respondents

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF MISSISSIPPI

PETITION FOR WRIT OF CERTIORARI

Hon. Milton Schlesinger
Attorney at Law
P.O. Box 869
Hattiesburg, MS 39401
Telephone: (601) 545-3722

Counsel for Petitioner

Hon. Wallace R. Gunn
Attorney at Law
P.O. Drawer 1729
Hattiesburg, MS 39401
Telephone: (601) 544-2312

Counsel for Co-Petitioner

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

PINE BELT LAND COMPANY,
Petitioner

HATTIESBURG REALTY COMPANY,
Co-Petitioner

VERSUS

MISSISSIPPI STATE HIGHWAY COMMISSION,
and
MRS. TERRY ANDERSON CURRIE, et al,
Respondents

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States.

Pine Belt Land Company, a Mississippi Corporation, the Petitioner herein, prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Mississippi, entered on December 9, 1981.

Hattiesburg Realty Company, a Mississippi Corporation, joins in this Petition to adopt the position of Pine Belt Land Company herein.

THE QUESTIONS PRESENTED FOR REVIEW

1. What is the latest date on which a taxable entity may acquire an interest in land from the owner, free and clear from a tax lien which attached to said land on

the tax date, as set by State statute,

to such an extent that if the taxing processes of such state are followed and the land is sold by a valid tax sale in fee simple to an individual for the non-payment of the taxes secured by such a lien,

the interest in said land acquired by such a taxable entity would not be affected by such tax sale?

2. What is the latest date on which a tax-exempt entity (church, state agency, etc.) may acquire an interest in land from the owner, free from a tax lien which attached to said land on the tax date as set by State statute,

to such an extent that if the taxing processes of such state are followed and the land is sold by a valid tax sale in fee simple to an individual for the non-payment of the taxes secured by such a lien,

the interest in said land acquired by such a tax-exempt entity would not be affected by such tax sale?

3. More specifically, in the case at bar, did the Mississippi State Highway Commission,

(an agency created, existing and acting pursuant to statutes passed by the Legislature of Mississippi, which statutes gave the Commission the right to sue and be sued),

when it condemned or purchased an ***EASEMENT***

FOR RIGHT OF WAY purposes on October 15, 1940 (from the owners, the Tuttle Heirs) on the land in this case,

after Januray 1, 1940,

(the date the statutory lien for taxes of Forrest County, Mississippi, for 1940, had attached), and

after August 22, 1940,

(the date on which the Board of Supervisors of Forrest County, Mississippi, sitting in a judiciary capacity, adjudicated "that all things required by law have been done", to assess said land in fee simple with no exceptions, and adjudicated the assessement rolls "are accepted, approved and made final" in the Minutes of said Board of Supervisors dated August 22, 1940), and

before September 21, 1941,

(when the Tax Collector of Forrest County, Mississippi, sold the fee simple in said land to an individual for unpaid 1940 taxes)

invalidate the lien, the Assessment, and the subsequent valid tax sale and disrupt the taxing authority of Forrest County, Mississippi, to such an extent that the easement would become exempt, but all other estates in said land would not be?

LIST OF PARTIES

1. Pine Belt Land Company, a Mississippi Corporation, is the Petitioner in this Petition of Certiorari. The Supreme Court of Mississippi held Pine Belt owns the fee simple in the land in this case subject to only to the easement of the Highway Commission.

2. Hattiesburg Realty Company, a Mississippi Corporation, who joins in this Petition as a Co-Petitioner, and affirms Pine Belt Land Company's contentions herein.

3. Mrs. Terry Anderson Currie, Daniel McMahon Currie, Alexander Currie, Jr., Overton A. Currie, Respondents to this Petition, who claimed the land in this suit by adverse possession and Cloverleaf Mall, Ltd., a Mississippi Limited Partnership who claimed the right to lease the land in this suit from the Curries should they have prevailed, in the Trial Court and the Supreme Court of the State of Mississippi. Both Courts held they had no right, title or interest in this land, and Petitioner and Co-Petitioner agree with such holding.

4. Mississippi State Highway Commission, Respondent to this Petition. The Supreme Court of Mississippi, held said Commission claim is only to an easement for right of way purposes on the land in this case.

TABLE OF CONTENTS

Page

Questions Presented for Review i

List of Parties iv

Table of Contents v

Table of Authorities vii

Opinions Below 1

Statement of Grounds of Jurisdiction 1

Constitutional Provisions and Statutes Involved in This Case 4

Concise Statement of the Facts Material to the Case 5

Stage in Proceedings at Which These Federal Questions Were Raised 7

Federal Jurisdiction 8

Argument Amplifying the Reasons Relied on for the Allowance of the Writ 9

Conclusion 12

Proof of Service 15

APPENDIX A - Final Decree A-1

TABLE OF CONTENTS (Continued)

Page

APPENDIX B - Opinion of the Supreme Court of Mississippi, Dated Nov. 4, 1981, Modified Dec. 9, 1981 ..... A-7

APPENDIX C - Constitutional Provisions and Statutes Involved in This Case A-27

APPENDIX D - Opinion, United States of America, v. State of Alabama (313 US 274–283.) A-34

TABLE OF AUTHORITIES

Page

Cases:

City of Laurel v. Weems, 56 So. 451 (1911) 12

Collector of Revenue for the City of St. Louis, Mo. v, Ford Motor Company, (Eight C.C.A. - 1946) 148 F.R.2d 354 13

District of Columbia v. Sussman et al (U.S.C.A., D.C. - 1964) 241 F.2d 683 12

United States of America v. State of Alabama, 313 U.S. 274, 85 L. Ed. 1327, 61 Ct. p. 1011 12

United States v. Certain Parcels of Land in Philadelphia, PA (Third C.C.A. - 1942) 130 F.2d 782 12

United States v. 25.936 acres of land in Bergen County N. J. (Third C.C.A. - 1946) 153 F.2d 277 12

Authorities:

Section 1257, 28 U.S.C.S. 586 "State Courts; Appeal; Certiorari" 2

Amendment XIV, Section 1, Constitution of United States, Mississippi Code of 1972, p. 110 4

Article 3, Section 17, Mississippi Constitution of 1890, Vol. 1, Mississippi Code of 1972, Annotated p. 243 4

TABLE OF AUTHORITIES (Continued)

Page

Article 4, Section 79, Mississippi Constitution of 1890, Vol. 1, Mississippi Code of 1972, Annotated, p. 344 4

Section 3120, Mississippi Code of 1930, Laws of 1934, Chapter 199, Vol. 1, p. 1408 ..... 4, 5

Section 3161, Mississippi Code of 1930, Vol. 1, p. 1425 4

Section 3164, Mississippi Code of 1930, Vol. 1, p. 1427 4

Section 3166, Mississippi Code of 1930, Laws of 1920, Chapter 323, Vol. 1, p. 1428 4

Section 3172, Mississippi Code of 1930, Vol. 1, p. 1430 5

Section 9935, Mississippi Code of 1942, Laws of 1934, Chapter 188, Vol. 7A, p. 183 5

Section 3120, Mississippi Code of 1930 5

OPINIONS BELOW

1. The Final Decree, dated August 1, 1980, in the Chancery Court of Forrest County, Mississippi (Trial Court), is copied verbatim on pages A-1 through A-6 of the Appendix hereto.

2. The Opinion of the Supreme Court of the State of Mississippi, dated November 4, 1981, and after Petitions for Review had been filed by all parties, all of which were denied on December 9, 1981, and Modified Opinion of the Supreme Court dated December 9, 1981 were so rendered and the modified opinion is reported in Vol. 406, So. 2d 329, and is copied verbatim on pages A-7 through A-26 of the Appendix hereto.

STATEMENT OF GROUNDS OF JURISDICTION

(i) The date of the Modified Judgment of the Supreme Court of the State of Mississippi was December 9, 1981.

(ii) The date all Petitions for rehearing in the Supreme Court of the State of Mississippi were denied was December 9, 1981.

(iii) There is no cross-petition for Writ of Certiorari under Rule 19.5.

(iv) (a) A paraphrase of part of Rule 17 of the Supreme Court of the United States is relied on in invoking jurisdiction of this Court, as one of the character of reasons that will be considered as follows:

"When a state court has decided a federal question in a way in conflict with applicable decisions of this Court."

(b) The statutory provision believed to confer on this Court jurisdiction to review the judgment or decree in question by this writ of certiorari is Section 1257, 28 U.S.C.S. 586, STATE COURTS; APPEAL; CERTIORARI

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under

the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.
(June 25, 1948, c. 646, 1, 62 Stat. 929; July 29, 1970, P. L. 91–358, Title I, Part D, Subpart 2, 172 (a) (1), 84 Stat. 590.)"

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THIS CASE

1. The Constitutional provisions which this case involves are as follows:

   a. Amendment XIV, Section 1, Constitution of the United States of America, copied verbatim on page A-32 of the Appendix hereto.

   b. Article 3, Section 17, Mississippi Constitution of 1890, Vol.1, Mississippi Code of 1972, Annotated, page 243, copied verbatim on page A-27 of the Appendix hereto.

   c. Article 4, Section 79, Mississippi Constitution of 1890, Vol. 1, Mississippi Code of 1972, Annotated, page 344, copied verbatim on page A-27 of the Appendix hereto.

2. The applicable statutory provisions which this case involves are as follows:

   a. ***Section 3120, Mississippi Code of 1930, Laws of 1934, Chapter 199,*** copied verbatim on pages A-27 thru A-28 of the Appendix hereto.

   b. ***Section 3161, Mississippi Code of 1930: WHEN ASSESSMENT ROLLS FILED*** - copied verbatim on pages A-28 thru A-29 of the Appendix hereto.

   c. ***Section 3164, Mississippi Code of 1930: WHAT TO BE DONE*** - Copied verbatim on pages A-29 thru A-30 of the Appendix hereto.

   d. ***Section 3166, Mississippi Code of 1930, Laws of 1920, Chapter 323, OBJECTIONS MUST BE FILED***

OR ASSESSMENT TO STAND - copied verbatim on page A-30 of the Appendix hereto.

e. *Section 3172, Mississippi Code of 1930: HOW ASSESSMENT APPROVED* - copied verbatim on page A-30 of the Appendix hereto.

f. *Section 9935, Mississippi Code of 1942, Laws of 1934, Chapter 188,* LISTS MADE - VESTS TITLE IN STATE OR PURCHASER - copied verbatim on page A-31 of the Appendix hereto.

CONCISE STATEMENT OF THE FACTS MATERIAL TO THE CASE

The facts are very simple and undisputed:

1. The heirs of Mrs. A. C. (Emma) Tuttle owned the land in this case in fee simple on January 1, 1940 when the lien for ad valorem taxes for the year 1940 for Forrest County and Mississippi attached to the fee simple interest in said land. ***Section 3120 Mississippi Code of 1930,*** copied verbatim on pages A-27 thru A-28 of the Appendix hereto.

2. On August 22, 1940, the Board of Supervisors of Forrest County, Mississippi, sitting in its judicial capacity, after equalizing the tax rolls and assessing all land in Forrest County, pronounced in its minutes dated August 22, 1940,

"that all things required by Law have been done" and the assessment rolls are

"accepted, approved and made final".

A. The lands in this case were assessed in said

assessment rolls for 1940 to the "heirs of Emma Tuttle".

NO ONE HAS EVER PAID THESE TAXES FOR 1940.

5. By instrument delivered on October 15, 1940 (not October 5, 1940, as set out in the Opinion of the Supreme Court of Mississippi), the heirs of Emma Tuttle (after the Highway Commission had adopted an order in its Minutes to condemn an easement on said land for highway purpose) executed an instrument conveying ONLY an easement for highway purposes to the State Highway Commission of Mississippi.

4. By tax sale dated September 14, 1941 the Tax Collector of Forrest County, Mississippi, sold the land in fee simple without exception to an Individual, (Pine Belt's predecessor in title), ***for the unpaid 1940 taxes***, and the Mississippi Supreme Court held it was a valid tax sale, and that Pine Belt Land Company, through mesne conveyances is now the owner in fee simple to said land, subject only to the Highway Easement. Please see Page A-25 of the Appendix.

5. This land was in 1940,and is now, low and swampy with no improvements on it, except that in 1973, the Highway Commission, without notice to the Tuttle heirs, built an asphalt service road across the small southeast extreme corner of it.

6. This land has not been assessed or taxed since 1940 to date.

7. Pine Belt succeeded to the title acquired at the tax

sale. Hattiesburg Realty succeeded to the title of the Tuttle heirs. The shareholders of Pine Belt and Hattiesburg Realty are identical and the titles were kept separate intentionally. Hattiesburg Realty joins in this Petition to affirm Pine Belt's position herein.

STAGE IN PROCEEDING AT WHICH THESE FEDERAL QUESTIONS WERE RAISED

The federal questions sought to be reviewed, based on both the Amendments to the Constitution of the United States identified herein as well as Articles of the Constitution of the State of Mississippi also identified herein, and based on the opinion rendered in 1941 by this Honorable Court in *United States of America v. State of Alabama*, 313 U.S. 274, 85 L.Ed. 1327, 61 S. Ct. p. 1011, were raised as follows:

A. Paragraph VI, page 7, Pine Belt's First Amended Cross-Bill of Complainant, dated November 15, 1979, Hattiesburg Realty Company's Abstract of Record, pages 40–46.

B. During the course of trial in the Lower Court when Pine Belt introduced into evidence, without objection, Exhibits 75 through 87, inclusive, Supplemental Exhibit Abstract submitted by Appellee and Cross-Appellant, Pine Belt Land Company, Volume I, pages 19 through 36, inclusive, and Volume II, pages 37 through 65, inclusive.

C. Pine Belt's memorandum brief to the Chancellor of the Chancery Court of Forrest County, Mississippi, after trial of this cause on its merits. Said brief was not made a part of the record.

D. Pine Belt's Cross-Appeal Brief to the Supreme Court of the State of Mississippi of May 22, 1981, Paragraph IV, Page 16; Paragraph V, pages 18 through 19; Paragraph VII, pages 22, 23, 24, 25, 26, 27 and 31.

E. Rebuttal Brief of Appellee and Cross-Appellant, Pine Belt Land Company to Appellee, Mississippi State Highway Commission, Paragraph I, pages 1 through 2.

F. Brief in Support of Pine Belt Land Company's Petition For Rehearing of November 18, 1981, pages 5 through 6, 7, and 8.

The opinion of *United States of America v. State of Alabama, supra* cited above, was quoted in Pine Belt's cross-appeal brief submitted on May 22, 1981, to the Mississippi Supreme Court on page 31, and in its brief on Petition for Rehearing submitted November 18, 1981, page 8.

FEDERAL JURISDICTION

Under the decision rendered by the Mississippi Supreme Court on December 9, 1981, the use of the land in question by Pine Belt, adjudicated to be the legal and rightful owner of the fee simple estate, has been denied without definition or explanation of any statutory or precedent legal opinion authorizing the severance of the right of way or easement to the Mississippi State Highway Commission from the entire fee to which there was a proper and procedurally correct assessment, or by such action impairing the obligation of the contract between the County and State with the purchaser at tax sale to take title and possession of the entire fee simple estate after the expiration of the statutory period for redemption. Denial of this is a taking of Pine Belt property rights in violation of the U.S. and Mississippi Constitution.

The questions raised on Constitutional issues and protection of real property rights in both the Lower and Supreme Court of Mississippi were not addressed by either court, and must be considered as being denied to the detriment of Pine Belt Land Company whose predecessor in title, at tax sale, paid and satisfied the tax lien on all estates in the land in question, and is being denied the right to enter upon the land to use it in any manner it so desires without interference from anyone including the Mississippi State Highway Commission. The tax lien had been perfected when the assessment was completed by written judgment of the Forrest County Board of Supervisors as prescribed by statute, and the Mississippi State Highway Commission could not obtain title to any estate nor sever such estate out of Pine Belt's title without either paying the 1940 taxes when due or by redeeming the property after the tax sale.

ARGUMENT AMPLIFYING THE REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

1. The answer to Question 1 on page i of this Petition is very direct and simple.

   Of the many thousands of Title Opinions written in the United States very day, every one written by a competent Attorney will invariably list "LIENS AND ENCUMBRANCES" and the first lien so listed will be

   "This land is subject to the lien for taxes for the current year."

   no matter what time of the taxable year the opinion is written.

2. It is submitted that the answer to questions 2 and 3

are equally simple and as taught by this Supreme Court of the United States in *United States of America v. State of Alabama*, 313 U.S. 274, 85 L.Ed. 1327, 61 S.Ct. p. 1011, and are answered with the same result:

"Our present inquiry is whether, assuming the validity of the state statute creating a lien as of October 1, 1936, as against other subsequent purchasers, it should be deemed invalid as against the United States. The question is not whether such a lien could be enforced against the United States. The fact that the United States had taken title and that proceedings could not be taken against the United States *WITHOUT ITS CONSENT* (Note: The Mississippi Highway Commission may sue or be sued by Statute, without its consent) would protect it against such enforcement, but that immunity would not be predicated upon the invalidity of the lien. . .
(EMPHASIS AND NOTE ADDED.)

The United States took the conveyances with knowledge of the state law fixing the lien as of October 1st. That law in creating such liens for the taxes subsequently assessed in due course and making them effective as against subsequent purchasers did not contravene the Constitution of the United States and we perceive no reason why the United States, albeit protected with respect to proceedings against it SHOULD STAND, SO FAR AS THE EXISTENCE OF THE LIENS IS CONCERNED IN ANY DIFFERENT POSITION FROM THAT OF OTHER PURCHASERS OF LANDS IN ALABAMA, WHO TAKE CONVEYANCES ON AND AFTER THE SPECIFIED TAX DATE. It is familiar practice for grantees who take title in such circumstances

TO SEE THAT PROVISION IS MADE FOR THE PAYMENT OF TAXES AND THE GOVERNMENT COULD EASILY HAVE PROTECTED ITSELF IN LIKE MANNER. Finding no constitutional infirmity in the state legislation, we think that the liens should be held valid.

We make no exception of the tract conveyed to the United States on the tax day, October 1, 1936, as we think the state statute, as contended by the state, is to be deemed effective from the moment the tax day began."
(EMPHASIS ADDED.)

Pine Belt has no quarrel with different states having different tax dates, different types of liens, different methods of assessment, and sales for taxes, BUT, IT DOES ARGUE MOST VEHEMENTLY THAT IT IS A FEDERAL QUESTION ARISING UNDER THE 14th AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA AS TO WHEN A SOVEREIGN (OR OTHER EXEMPT ENTITY, BE IT CHURCH, OR OTHERWISE) CAN DEFEAT AN ASSESSMENT IN WHOLE OR PART, MAKE NO EFFORT TO PROTECT ITSELF FROM THE LIEN, AND THUS TAKE FROM THE GOOD FAITH PURCHASER AT A VALID TAX SALE PROPERTY WHICH SUCH GOOD FAITH PURCHASER BOUGHT IN RELIANCE ON THE TAXING LAWS OF THAT PARTICULAR TAXING AUTHORITY.

If the taxes for 1940 had not been paid, and if the Tax Sale had been procedurally invalid, then the purchaser at the tax sale would have, under Mississippi State Statute, a valid lien against the property until the lien as assessed (being the entire fee) for 1940 had been paid. Since the tax sale was held by the Supreme Court of Mississippi to be

procedurally a valid tax sale, then it follows as the night the day, that which was assessed (being the entire fee) went with the sale.

CONCLUSION

The undersigned presented questions 1, 2 and 3 as set out on pages i–iii of this Petition for Certiorari directly to the Supreme Court of Mississippi, and quoted to said Court *United States of America v. State of Alabama, supra,* and numerous other cases holding that any interest acquired by a tax-exempt entity after the tax lien had attached for the current year, would be subject to the tax lien, and foreclosed by any tax sale.

It is with much respect to the Supreme Court of Mississippi, that we now feel compelled to state to this Supreme Court of the United States that the Supreme Court of Mississippi completely ignored the teachings of this Court, and relied on an erroneous, ambiguous case entitled *City of Laurel v. Weems,* 56 So. 461 (Miss. 1911), but did not even indicate why they thought *City of Laurel,* id, applied. *City of Laurel,* id, is readily distinguishable from the case at Bar.

Pine Belt Land Company submits it could quote at length from numerous cases upholding its position and confirming *United States of America v. State of Alabama, supra,* such as

United States v. Certain Parcels of Land in Philadelphia, PA (Third C.C.A. - 1942) 130 F.2d 782.

United States v. 25.936 Acres of Land in Bergen County, N. J. (Third C.C.A. - 1946) 153 F.2d 277.

District of Columbia v. Sussman et al - (U.S.C.A., D.C. - 1964) 241 F.2d 683.

Collector of Revenue for the City of St. Louis, Mo. v. Ford Motor Company, (Eighth C.C.A. - 1946) 148 F.R. 2d 354.

and numerous State decisions, but it is thought that a Petition for Writ of Certiorari is not the proper place to include that which would amount to a brief.

It is inconceivable to allow one tax-exempt entity (church, state agency, etc., including but not limited to one unit of government having absolutely no taxing authority) to enrich itself at the expense of the Citizens of a unit of government who rely almost entirely on their empowered taxing authorities to satisfy public obligations. *Madison Co. v. School District #7*, 27 NW 2d 172, (Neb. 1947).

It is submitted that Pine Belt Land Company's predecessor in title paid the 1940 judgment tax lien and received in exchange therefor, the fee simple interest in said land. To now snatch away an interest in said land under the guise of legality is patently unconstitutional, and would amount to allowing a branch of sovereignty to do that which is expressly prohibited by the 14th Amendment, and would impair the contract between Forrest County and Pine Belt's predecessor in title, contrary to Article I, Sec. 10, Ch. 1, of the United States Constitution. (See Appendix page A-32.

> The Highway Commission could have protected itself by paying the taxes before the tax sale, out of the award of purchase, or by redeeming within two (2) years after the tax sale.

Many, many other states are in this same quandary, by refusing to listen to the teachings of this United States Supreme Court.

Slavery became a federal question, anti-trust became a federal question, civil rights became a federal question, search and seizure became a federal question, taxation by States has become a federal question by numerous decisions of this Supreme Court, and it is submitted it is going to become increasingly so; and among those, are going to be cases having identical facts as this case. Now is the time for this Supreme Court to re-declare conformity of the case at bar, with its holdings in *United States of America v. State of Alabama, supra.*

Pine Belt Land Company sincerely and respectfully requests that this Petition be allowed so it can present authority in a Brief and Oral Argument.

RESPECTFULLY SUBMITTED this 8th day of March, 1982.

PINE BELT LAND COMPANY

BY: Milton A. Schlesinger

MILTON A. SCHLESINGER,
Counsel for Pine Belt Land
Company, Petitioner
P.O. Box 869
Hattiesburg, MS 39401
Telephone: (601) 545–3722

Wallace R. Gunn

WALLACE R. GUNN
Counsel for Hattiesburg Realty Company,
Co-Petitioner
P.O. Drawer 1729
Hattiesburg, MS 39401
Telephone: (601) 544–2312

PROOF OF SERVICE - - CERTIFICATE BY BAR MEMBER

We, Milton A. Schlesinger, attorney for Petitioner Pine Belt Land Company, and Wallace R. Gunn, attorney for Co-Petitioner Hattiesburg Realty Company, Co-Petitioners herein, and members of the Bar of the Supreme Court of the United States, hereby certify that on the 8th day of March, 1982, we served copies of the foregoing Petition for Writ of Certiorari upon counsel for respondents, in accordance with law and the rules of the Supreme Court of the United States, by mailing copies in duly addressed envelopes, first-class postage prepaid, to the following representative attorneys of record:

Of Counsel for Overton A. Currie, et al:

Hon. Frank D. Montague, Jr.
Gray, Montague & Pittman
Attorneys at Law
P.O. Drawer 1975
Hattiesburg, MS 39401

Hon. J. B. Van Slyke, Jr.
Attorney at Law
P. O. Box 1506
Hattiesburg, MS 39401

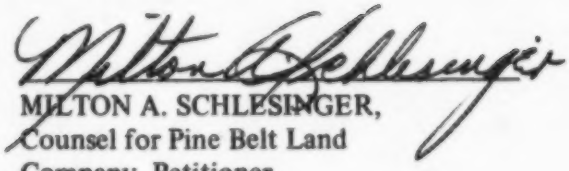
Hon. George G. Currie, Jr.
Attorney at Law
P. O. Box 626
Hattiesburg, MS 39401

Of Counsel for State Highway Commission of Mississippi:

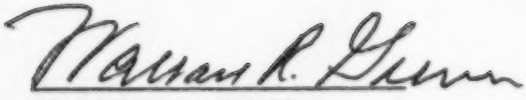
Hon. Moran M. Pope, Jr.
Pope & Pope
P.O. Box 1463

Hattiesburg, MS 39401

Frank E. Shanahan, Jr.
Assistant Attorney General
State of Mississippi
P.O. Box 1850
Jackson, MS 39205



MILTON A. SCHLESINGER,
Counsel for Pine Belt Land
Company, Petitioner



WALLACE R. GUNN,
Counsel for Hattiesburg Realty
Company, Co-Petitioner



Appendix

APPENDIX A

IN THE CHANCERY COURT OF
FORREST COUNTY, MISSISSIPPI

HATTIESBURG REALTY COMPANY,
A MISSISSIPPI CORPORATION
COMPLAINANT AND
CROSS–DEFENDANT

VERSUS

PINE BELT LAND COMPANY,
MISSISSIPPI STATE HIGHWAY
COMMISSION, AND MRS. TERRY
ANDERSON CURRIE, ET AL
DEFENDANTS AND
CROSS-COMPLAINANTS

CAUSE NO. 36,285

FINAL DECREE

The above styled and numbered cause having come on for hearing before the Court in Vacation on the date and at the place previously agreed upon by the Court and the Solicitors of Record for each of the parties herein; whereupon the Court proceeded to take testimony of witnesses for all of the parties involved herein on the Second Amended Bill of Complaint, and all other pleadings, Cross-Bills, Answers, and Affirmative Matters filed by all of the parties; and the Court having thereafter received evidence in the form of testimony and documentary evidence, and at the request of all of the Solicitors of Record, proceeded to take the matter under advisement and allow the submission of memorandum briefs on behalf of all of the respective parties on all of the issues before the Court; and thereafter, having

received all of said briefs, the Court fully and completely studied all of the pleadings on file in this matter, together with all of the exhibits received in evidence at the hearing, and each of the briefs of counsel submitted on behalf of the respective parties and having thereafter made an extensive and diligent search of the laws which the Court considered applicable to said issues involved herein, and based upon all of the same is of opinion and does hereby find, as follows, to-wit:

I.

That neither Hattiesburg Realty Company, a Mississippi Corporation, nor any of its alleged predecessors in title have ever been in actual or constructive possession of the property in question since the date of the Deed from the heirs of Mrs. Emma Tuttle, deceased, to the Mississippi State Highway Commission, on October 5, 1940, to date, and they do not claim to have ever had any such possession.

II.

That the aforementioned Deed from the heirs of Mrs. Emma Tuttle, deceased, was and is a valid deed, and does not contain any reverter clause or other such restriction, and the property conveyed in its entirety was conveyed as highway right-of-way and for a cash consideration, and was duly recorded on the Land Deed Records of Forrest County, Mississippi.

III.

That the Mississippi State Highway Commission used said property uninterruptedly and continuously for a period of time in excess of thirty-five years prior to any claim being made to any interest therein by others.

IV.

That the use of said property as a highway right-of-way has been within that use comtemplated by the Laws of the State of Mississippi.

V.

That the term "highway" in its legal sense, includes not only the roadway itself but the entire right-of-way as well, including that portion needed for maintenance, safety, repair, beautification, traffic control, drainage, and possible or anticipated expansion of re-routing.

VI.

That the claim of Hattiesburg Realty Company, a Mississippi Corporation, is barred by the Statute of Limitations.

VII.

That the Mississippi State Highway Commission is a public body and an agency of the State of Mississippi, and is therefore immune from suits for willful trespass under the Doctrine of Sovereign Immunity.

VIII.

That although the Deed from the heirs of Emma Tuttle, deceased, did not convey a fee simple title, but conveyed only a right of way easement title at the time of its execution and recordation, the Mississippi State Highway Commission, after obtaining statutory rights to acquire fee simple title has acquired said fee title by more than ten years adverse possession under color of title by virtue of the deed from the heirs of Emma Tuttle, deceased, which fee simple title had ripened in said Mississippi State Highway

Commission even prior to the alleged acquisition of title thereto by Hattiesburg Realty Company, a Mississippi Corporation.

IX.

That neither Pine Belt Land Company, a Mississippi Corporation, nor any of its alleged predecessors in title have ever been in actual or constructive possession of the property in question since the date of the deed from the heirs of Mrs. Emma Tuttle, deceased, to the Mississippi State Highway Commission on October 5, 1940, to date, and they do not claim to have ever had such possession.

X.

That the claim to the property in question by Pine Belt Land Company, a Mississippi Corporation, is barred by the Statute of Limitations.

XI.

That the purported City and County tax sales of said property in question, or September 15, 1941, for 1940 taxes thereon, were void, and of no force and effect.

XII.

That any lien for taxes on said property in question for the year 1940 were extinguished when the Sovereign purchased the property on October 5, 1940.

XIII.

That adverse possession by Mrs. Terry Anderson Currie, Edward Alexander Currie, Jr., Overton A. Currie, and Daniel McMahan Currie for a ten year period of time prior to the

deed to the Mississippi State Highway Commission on October 5, 1940 was not clearly and convincingly shown by the proof at the hearing hereon.

XIV.

That since an individual, or group of individuals, cannot claim property adversely to the Sovereign, and the property in question has been continually located within U.S. Highway 49 state highway right of way monuments and markers and has been so identified for more than 35 continuous years, Mrs. Terry Anderson Currie, Edward Alexander Currie, Jr., Overton A. Currie, and Daniel McMahan Currie have not been able to establish any further claim to the title of the property in question since its conveyance to the Mississippi State Highway Commission on said date of October 5, 1940.

XV.

Even if Mrs. Terry Anderson Currie, Edward Alexander Currie, Jr., Overton A. Currie, or Daniel McMahan Currie had, in fact, established a good title to said property by adverse possession prior to the execution and delivery of the aforementioned deed from the heirs of Mrs. Emma Tuttle, deceased, to the Mississippi State Highway Commission, the said Mississippi State Highway has long since acquired fee simple title in itself by more than ten years adverse possession, under color of title.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Original Bill of Complaint of Hattiesburg Realty Company, a Mississippi Corporation, and all subsequent amendments thereto be, and the same hereby are, denied and dismissed with prejudice.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED THAT the Answer and Original Cross-Bill, and all

amendments thereto, filed by Pine Belt Land Company, a Mississippi Corporation, be and the same hereby are, denied and dismissed with prejudice.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Answer and Cross-Bill, and all amendments thereto, filed by Mrs. Terry Anderson Currie, Edward Alexander Currie, Overton A. Currie, Daniel McMahan Currie, and Cloverleaf Mall Ltd., who abase their claim on that of the Curries, be, and the same hereby are, denied and dismissed with prejudice.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Chancery Clerk of Forrest County, Mississippi, be, and he hereby is, ordered and directed to place a certified copy of this Final Decree on the Land Deed Records of said Forrest County, Mississippi, and to cause notation thereof to be placed upon both the General and Sectional Indexes to said Land Deed Records on file in his office, thereby confirming title to said property in the Mississippi State Highway Commission, an agency of the State of Mississippi, and cancelling of record any and all purported conveyances from and after October 5, 1940, thereby causing each and every such instrument to be set aside and held for naught as same relates to the title of Mississippi State Highway Commission from and after said date of October 5, 1940, to that certain land involved herein and described as follows to-wit:

> All of Lots 9, 10, 11 and 12 in Block Six, West End Addition to the City of Hattiesburg, Mississippi.

SO ORDERED, ADJUDGED AND DECREED on this the 1st day of August, A.D., 1980.

/s/ Howard L. Patterson
CHANCELLOR - PLACE ONE

APPENDIX B

HATTIESBURG REALTY COMPANY
v.

MISSISSIPPI STATE HIGHWAY COMMISSION, Pine Belt Land Company and Mrs. Terry Anderson Currie, et al.

No. 52917

Supreme Court of Mississippi.
Nov. 4, 1981.

As modified Dec. 9, 1981.

Dispute arose as to ownership of title to certain land over which State Highway Commission was deeded casement for right of way purposes. The Chancery Court, Forrest County, Howard Patterson, Chancellor, confirmed fee simple title in Commission, and various parties appealed. The Supreme Court, Robertson, P. J., held that (1) chancellor erred in holding that Commission acquired fee simple title to lots in question by adverse possession under color of title; (2) chancellor properly found that Commission was immune from suits for willful trespass under doctrine of soverign immunity; (3) plaintiffs failed to establish adverse possession over land which was allegedly completed before Commission was deeded rights of way over land in 1940; and (4) city and county tax sales of property for nonpayment of city, county and state ad valorem taxes were not void because Commission obtained casement for right of way purposes over the land the year before the tax sales.

Affirmed in part, reversed in part and rendered.

1. Highways Key 79(7)

If and when the State Highway Commission should decide

to abandon its right-of-way easement over all or any portion of lots deeded to it in 1940 "for right-of-way purposes," or should declare all or any portion of said lots surplus under applicable law, disposition of the whole or such portion would be governed and controlled by applicable Mississippi law.

2. Highways Key 80

Statute granting statutory authority to State Highway Commission to acquire fee simple title to lands needed by it did not in and of itself, ipso facto, vest fee simple title in Commission to lands in which Commission had only acquired casement rights for right of way purposes. Laws 1948, c. 332, §8.

3. Adverse Possession Key 58

State Highway Commission did not establish fee simple title to lots over which Commission had acquired by deed rights of way by adverse possession under color of title where Commission maintained land as portion of its right of way for purposes of drainage, traffic safety, beautification and future needs, no part of lots had ever been used for any purpose inconsistent with the right of way purposes only and Commission made no hostile claim to land. Laws 1948, c. 332, §8.

4. Adverse Possession Key 114(1)

State Highway Commission established that it used property over which it acquired right of way easement by deed continuously and uninterruptedly for 35 years for highway purposes, and term "highway" included not only roadway itself but entire right of way as well since undisputed proof was that Commission had continuously maintained property for highway purposes at least since 1940 by regularly

mowing, picking up trash and limbs, and regularly cleaning out culverts installed for drainage purposes.

5. Highway Key 79(5)

When the State Highway Commission included unopened street and certain avenue within its highway right-of-way, it preempted the use of those streets by city and by the citizens thereof for street purposes, and if and when the Commission should legally abandon all or any portion of its right-of-way in that street or avenue, disposition of such abandoned portion would be governed and controlled by applicable Mississippi law.

6. Highways Key 83

Inasmuch as the State Highway Commission only acquired an easement for right-of-way purposes in and over the surface of certain lots, ownership of the oil, gas and minerals remained in the owners of the fee and their successors in title, either by deed or valid tax sale.

7. States Key 191(1.22)

State Highway Commission was immune from suits for willful trespass under doctrine of sovereign immunity arising out of ownership of land over which Commission had been deeded right of way easement.

8. Adverse Possession Key 60(1)

Realty companies and land companies claims to land over which State Highway Commission was deeded easement for right of way were not barred by statute of limitations since Commission only used property in question consistent with his easement rights for right of way purposes and, therefore, acquired no further title of right by adverse possession.

9. Adverse Possession Key 68

Plaintiffs failed to establish adverse possession over land which was allegedly completed before State Highway Commission was deeded right of way easement over land in 1940 since predecessor in title to plaintiffs conveyed to Commission, for right of way purposes, the land and specifically excepted from his claim of ownership land for which adverse possession was asserted.

10. Taxation Key 514

City and county tax sales of land for nonpayment of city, county and state ad valorem taxes were not void because State Highway Commission obtained easement for right of way purposes over the land the year before the tax sales since the tax sales did not effect rights granted to Commission, but were valid as to any other rights not purchased or acquired by Commission.

Wallace R. Gunn, Hattiesburg, Gerald, Brand, Watters, Cox & Hemleben, Martha Gerald, Jackson, for Hattiesburg Realty. J. B. Van Slyke, Jr., George G. Currie, Jr., Gray, Montague & Pittman, Frank D. Montague, Jr., Hattiesburg, for Currie, et al, and Cloverleaf Mall.

Milton Schlesinger, Hattiesburg, for Pine Belt Land Co.

Pope & Pope, Moran M. Pope, Jr., Hattiesburg, Bill Allain, Atty. Gen., by Frank E. Shanahan, Jr., Asst. Atty. Gen., Jackson, for Highway Commission.

Before ROBERTSON, P. J., and BROOM and HAWKINS, JJ.

ROBERTSON, Presiding Justice, for the Court:

Hattiesburg Realty Company appeals from a decree of the Chancery Court of Forrest County, dismissing its original and first and second amended bills of complaint against Mississippi State Highway Commission, Pine Belt Land Company, Mrs. Terry Anderson Currie, Edward Alexander Currie, Jr., Overton A. Currie, Daniel McMahon Currie, and Cloverleaf Mall, Ltd., to confirm title to Lots 9, 10, 11 and 12, Block 6, West End Addition to the City of Hattiesburg, Mississippi.

Defendant Pine Belt Land Company and Defendants the Curries, et al, cross-appeal from a dismissal of their respective cross-bills in which they each prayed for confirmation of title to the said lots.

The final decree confirmed fee simple title to said lots in the Mississippi State Highway Commission and canceled of record "any and all purported conveyances from and after October 5, 1940, thereby causing each and every such instrument to be set aside and held for naught as same relates to the title of Mississippi State Highway Commission from and after said date of October 5, 1940.

In 1940, the State Highway Commission determined that it was in the public interest to improve U.S. Highways 49 and 11, south of Hattiesburg, for the traveling public. This would be accomplished by 4-laneing U.S. Highways 49 and 11 and constructing a cloverleaf interchange at the intersection of U.S. Highways 49 and 11. Among the right-of-way easements acquired was one from the heirs of Emma Tuttle. The warranty deed from the heirs of Mrs. Tuttle was executed on October 5, 1940, and granted unto the State Highway Commission "for right-of-way purposes":

Lots, 9, 10, 11 and 12 in Block 6, in the D.

M. Gatlins West End Addition to Hattiesburg, Mississippi.

World War II intervened, and finally in 1947 the improvement of U.S. Highways 49 and 11 and the construction of the cloverleaf interchange were completed. A large shopping center and many business establishments were constructed and developed around this cloverleaf interchange. Later a service road was constructed paralleling the ramp approach in the northeast quadrant of the interchange. While no part of the 4 Tuttle lots was used in the roadbed for the northeast ramp or service road, these lots have been continuously used since 1947 by the Highway Commission as a buffer zone between the service road and the shopping center. A paved four-lane entrance and exit road was constructed through the middle of this property connecting the northeast quadrant service road with the Cloverleaf Mall parking area. Two large concrete drainage culverts were constructed on the Tuttle lots. The Commission since 1947, has continuously used these lots for drainage purposes and has regularly mowed, cleaned up, pruned trees and otherwise maintained and preserved the scenic beauty of these lots. They continue to be used as a buffer zone for the safety of the traveling public.

The numerous assignments of error can, in our opinion, be safely reduced to these eight:

I. The chancellor erred in holding the deed from the heirs of Emma Tuttle was and is a valid deed without any reverter clause or other such restriction.

II. The chancellor erred in holding the commission, after obtaining statutory rights to acquire fee simple title, acquir-

ed fee simple title to the property by adverse possession under color of title.

III. The chancellor erred in finding the commission had used the property uninterruptedly and continuously for a period of time in excess of 35 years and such use had been within that contemplated by the laws of the State of Mississippi and that the term "highway" in its legal sense includes not only the roadway itself but the entire right-of-way as well.

IV. The chancellor erred in not adjudicating the rights of the parties with regard to Huston Avenue, Washington Street, and the alley in Block 6 of West End Addition, and the oil, gas and minerals.

V. The chancellor erred in holding the commission was immune from suits for willful trespass under the doctrine of sovereign immunity.

VI. The chancellor erred in finding that Hattiesburg Realty's and Pine Belt's claims were barred by the statute of limitations.

VII. The chancellor erred in finding that the proof was insufficient to establish adverse possession for the statutory period by the Curries prior to the October 5, 1940, Tuttle deed to the commission, and that the proof was also insufficient to establish the Curries'

title to the property by adverse possession since October 5, 1940.

VIII. The chancellor erred in ruling that the city and county tax sales of the property on September 15, 1941, for 1940 advalorem taxes were void and that any liens for taxes on the property for the year 1940 were extinguished when the commission purchased the property for right-of-way purposes on October 5, 1940.

I.

Appellant contends that the chancellor erred in holding that the October 5, 1940, deed from the heirs of Emma Tuttle was and is a valid deed without any reverter clause or other such restriction. The warranty deed from the heirs of Mrs. Tuttle was executed on October 5, 1940, and granted unto the State Highway Commission "for right-of-way purposes":

> Lots 9, 10, 11 and 12 in Block 6, in the D. M. Gatlins West End Addition to Hattiesburg, Mississippi.

Mississippi Code of 1930 Annotated, section 4998, which was in effect when the Tuttle deed was executed on October 5, 1940, provided in part:

> "That the state highway commission shall have complete control and supervision, with full power and authority to locate, relocate, widen, alter, change, straighten, construct, or reconstruct any and all roads on the state highway system as herein defined, and shall

> have full and complete authority for the making of all contracts, surveys, plans, specifications, and estimates for the location, laying out, widening, straightening, altering, changing, constructing, reconstructing and maintaing and securing ***rights-of-way therefor*** of any and all such highways, and to authorize the employees of the state highway department to enter upon private property for such purposes."
> (Emphasis added).

This section was construed by this Court as giving the commission authority to acquire only a right-of-way or easement in property for highway purposes. ***Nicholson v. Board of Mississippi Levee Com'rs, et al.***, 203 Miss. 71, 33 So. 2d 604 (1948) and ***Whitworth v. Mississippi State Highway Commission***, 203 Miss. 94, 33 So.2d 612 (1948).

The Tuttle deed itself conveys these four lots to the State Highway Commission "for right-of-way purposes" only.

In ***Dantzler v. Mississippi State Highway Commission***, 190 Miss. 137, 199, So. 367 (1941), this Court stated:

> "It is a grave error to suppose that a condemnor of a right of way for a public road takes any such an interest as the entire fee in the land. In ***Campbell v. Covington County***, 161 Miss. 374, 378, 137 So. 111, 112, this court said: 'And whether the right of way is acquired by condemnation or prescription, the title to the soil, and all the profits thereof consistent with the existence of the easement, remain in the original owner." 190 Miss. at 148, 199 So. at 370.

[1] If and when the Commission decides to abandon its right-of-way easement over all or any portion of the Tuttle lots, or declares all or any portion of the Tuttle lots surplus under applicable law, the disposition of the whole or such portion would be governed and controlled by applicable Mississippi law. We have noted MCA §§65–1–59 and 65–1–75 (Supp. 1981) and MCA 65–1–123 (1972), but express no opinion as to the applicability or non-applicability of these statutes to any possible future factual situation that might develop.

II.

Appellant's next contention is that the chancellor erred in holding that, after legislation was passed granting the Commission the right to acquire fee simple title to lands needed by it, the Commission acquired fee simple title to the four Tuttle lots by adverse possession under color of title.

[2] Mississippi General Laws, Chapter 332, section 8 (1948), granted statutory authority to the Commission to acquire fee simple title to lands needed by it. This law in and of itself did not, *ipso facto*, vest fee simple title in the Commission to lands in which the Commission had only acquired easement rights for right-of-way purposes. If, after the passage of this legislation, the Commission should determine that fee simple title is now necessary in order for it to carry out its duties and responsibilities, then it would be necessary for the Commission to acquire fee simple title either by further purchase, gift, or condemnation proceedings against the property owner.

In *Williams v. Patterson, et al*, 198 Miss. 120, 21 So.2d 477 (1945), this Court said:

"It is further argued that appellant by

himself and through his predecessors in title acquired title to this land by adverse possession of more than fifty years, and cites an Illinois case, *Illinois Central R. Co., v. Noyes,* 252 Ill, 178, 96 N.E. 830, where the Illinois Court held that if a railroad company condemned land for a right of way and paid therefor, it could obtain a fee-simple title thereto by adverse possession for the statutory period. However, the general rule is thus announced in 2 C.J.S. Adverse Possession §89, p. 646, 'Claim or use of an easement is consistent with, rather than hostile to, the title of another to the fee, and possession attributable to the easement will not be regarded as adverse to the fee title of another unless and until there is notice of a hostile claim to the fee.' " 198 Miss. at 130, 21 So. 2d at 480.
See also St. Regis Pulp & Paper Corp. v. Floyd, 238 So.2d 740 (Miss. 1970).

[3] The proof at trial was that the Commission had maintained the Tuttle lots as a portion of its right-of-way for drainage, traffic safety, beautification, and future needs. No part of these lots has ever been used for any purpose inconsistent with their use for right-of-way purposes only. No hostile flag has ever been run up; no hostitle claim has ever been made. In the absence of any notice of a hostile claim, adverse possession cannot be asserted against the owner of the fee.

The chancellor erred in holding that the Commission had acquired fee simple title to the Tuttle lots by adverse possession under color of title.

III.

[4] Appellant contends that the chancellor erred in finding that the Commission had used the property continuously and uninterruptedly for over 35 years for highway purposes, and that the term "highway" includes not only the roadway itself but the entire right-of-way as well.

The term "highway" or "road" was defined in Mississippi Code of 1930 Annotated, section 5021, in this way:

> "When used in this chapter, unless the context indicates otherwise, the term 'highway' or 'road' includes rights of way, bridge and drainage structures signs, guard rails and other structures made in connection with such highway or road; . . ."

This definition has been brought forward unchanged and is presently found in MCA §65–1–1 (1972).

In *Reed v. Mississippi State Highway Commission*, 260 So.2d 184 (Miss. 1972), this Court said:

> "The determination of the amount of right-of-way necessary for any given highway is within the discretion of the State Highway Commission under policies that it may adopt from time to time, unless the Legislature limits this power.

"The general rule is stated in 26 Am. Jur.2d Eminent Domain Section 114 (1966) which is as follows:

> 'In the absence of a statute controlling the amount of land that may be taken for a public purpose, the grantee of the power of

eminent domain may exercise a large discretion in such respect. This discretion as to the amount is not reviewable by the courts, unless, possibly, where there has been a gross abuse or manifest fraud. (26 Am. Jur.2d Eminent Domain at p. 772).'

"A further statement of the general rule is found in 29A C.J.S. Eminent Domain §92 (1965) as follows:

'Prospective needs. ***The amount of land which may be taken*** by a grantee of the power of eminent domain ***need not be restricted to the needs of the immediate future. The grantee may condemn lands sufficient to provide for not only its present but also its prospective necessities,*** if it is not more than may in good faith be presumed necessary for future use within a reasonable time. ***The determination of the grantee will not be interfered with by the courts except in a clear case of abuse of discretion.*** . . . (29A C.J.S. Eminent Domain at pp. 386, 387).' "
(Emphasis added).

260 So.2d at 186–87.

See also ***Pearl River Valley Water Supply District v. Brown,*** 248 Miss. 4, 156 So2d 572 (1963).

In the recent case of ***Robert E. Ratliff Company, Inc. v. Mississippi State Highway Commission,*** 400 So.2d 1211 (Miss. 1981), this Court said:

"It would be novel indeed to require courts to oversee an administrative body charged with maintaining public highways and streets and chop off outer portions of a right-of-way simply because of some claim the right-of-way was not being used to its full width. We adhere to the rule set forth in 39A C.J.S. Highways, §131(b), p. 851:

> 'If a highway is legally laid out and established, the mere fact that the public does not use it to its entire width will not of itself constitute an abandonment of any portion thereof. The rule is the same whether or not the road is fenced by the adjoining landowners. Encroachments on a highway continually used cannot be legalized by mere lapse of time; the limited use will not lessen the right of the public to use the entire width of the road whenever the increased travel and exigencies of the public render this desirable.' "

400 So.2d at 1214.

The undisputed proof was that the Commission had continuously maintained the Tuttle lots for highway purposes at least since 1950 by regularly mowing, picking up trash and limbs, and regularly cleaning out culverts installed for drainage purposes.

The ever broadening duties and responsibilities of the Commission to provide for the safety and convenience the traveling public are made crystal clear in this recent enactment of the Legislature:

"The Mississippi State Highway Commission is hereby authorized to acquire by gift, purchase, or otherwise, and to have the state highway department improve and maintain strips of land necessary for the restoration, preservation and enhancement of scenic beauty adjacent to the state highway right-of-way. The commission may acquire and have the state highway department develop publicly owned and controlled rest and recreation areas and sanitary and other facilities within or adjacent to the highway right-of-way reasonably necessary to accommodate the traveling public." MCA Section 65–1–51 (1981 Supp.).

The chancellor was correct in holding that the Commission had used the Tuttle lots continuously and uninterruptedly for in excess of 35 years for highway purposes, as contemplated by the laws of Mississippi, and that the term "highway" includes not only the roadway itself but also the entire right-of-way as well.

IV.

Appellant next contends that the chancellor erred in not adjudicating the rights of the parties in Washington Street, Huston Avenue, and the alley in Block 6 of West End Addition, as well as the oil, gas and mineral rights.

Lots 9 through 12, Block 6, West End Addition, in and over which the Commission has an easement for right-of-way purposes, are bounded on the north by Washington Street and on the west by Huston Avenue. On the south these lots are bounded by an alley through the center of block 6. Although these streets and the alley were dedicated to the public use when the plat was officially approved and placed of record, they had not been laid out and opened up at the time the Commission acquired an easement in and over these lots for right-of-way purposes.

[5] When the Highway Commission included unopened Washington Street and Huston Avenue within its highway right-of-way, it preempted the use of these streets by the City of Hattiesburg and by the citizens thereof for street purposes. If and when the Commission legally abandons all or any portion of its right-of-way in Washington Street or Huston Avenue, the disposition of such abandoned portion would be governed and controlled by applicable Mississippi law. We have noted MCA section 65–1–75 (Supp. 1981), but express no opinion as to the applicability or non-applicability of this statute to any possible future factual situation that might develop.

[6] Inasmuch as the Commission only acquired an easement for right-of-way purposes in and over the surface of the four Tuttle lots, the ownership of the oil, gas, and minerals remained in the owners of the fee and their successors in title, either by deed or valid tax sale.

The chancellor was correct in not adjudicating the rights of the parties in Washington Street and Huston Avenue.

V.

[7] The next contention made by the appellant is that the chancellor erred in holding that the Commission was immune from suit for willful trespass under the doctrine of sovereign immunity. There is no merit in this contention.

In *French v. Pearl River Valley Water Supply District*, 394 So. 2d 1385 (Miss. 1981), we declined to abolish the doctrine of governmental immunity, restating the general rule that a general grant of statutory authority to sue a governmental subdivision or agency does not create any liability, and suit may be maintained thereunder only for such liability as is authorized by statute, expressly or by necessary implication.

The chancellor was correct in holding the Commission immune from suits for willful trespass under the doctrine of sovereign immunity.

VI.

[8] Hattiesburg Realty Company and Pine Belt Land Company contend that the chancellor erred in finding that their claims were barred by the statute of limitations.

In view of our finding that the Commission only used the Tuttle lots consistent with its easement rights for right-of-way purposes and, therefore, acquired no further title or right by adverse possession, the chancellor erred in finding that the claims of Hattiesburg Realty and Pine Belt were barred by the statute of limitations.

VII.

The Curries contend that their proof was sufficient to establish title in them by adverse possession for the 10-year statutory period before the October 5, 1940, Tuttle deed to the Commission, and that if that proof were insufficient then they have established title in them by virtue of their adverse possession since October 5, 1940.

[9] There is no merit in either of these contentions. On December 30, 1939, the late Alexander Currie the predecessor in title to all of the Curries, conveyed to the State Highway Commission for right-of-way purposes all of Block 6 except Lot 7 and Lots 9–12, West End Addition, and other properties. By thus excepting Lots 9 through 12, Block 6, West End Addition, the grantor, who died in 1947, acknowledged that he did not own Lots 9 through 12 and, therefore, was making no claim to them.

The evidence of adverse possession after 1940 (and there

was none as to the easement rights of the Commission) was very weak, and any acts testified to were sporadic and not continuous. Since the testimony was disputed and thus was a factual question to be determined by the chancellor, we cannot say that the he abused his discretion in finding that the Curries failed to establish a claim to the property by adverse possession after October 5, 1940.

VIII.

[10] Pine Belt Land Company contends that the chancellor erred in ruling that the city and county tax sales of the four Tuttle lots, on September 15, 1941, for the 1940 city, county and state advalorem taxes, were void, and that any lien for such taxes for the year 1940 were extinguished when the Commission purchased the property on October 5, 1940.

In answering this assignment of error, we need only refer to the fact that the only right acquired by the Commission in the Tuttle deed of October 5, 1940, was an easement for right-of-way purposes and state again that all other rights and title remained in the Tuttle heirs and were subject to sale by the City of Hattiesburg and Forrest County for nonpayment of the 1940 city, county and state advalorem taxes.

The chancellor's only reason for finding that these tax sales were void was because of the Tuttle deed of October 5, 1940, to the Commission. These tax sales of September 15, 1941, of course, would not affect the easement rights granted to the Commission almost a year before, but these sales would be valid as to any other rights not purchased or acquired from the land owners, and, therefore, still retained by them. *See City of Laurel v. Weems*, 100 Miss. 335, 56 So. 451 (1911) and *Whitworth v. Miss. State Hwy. Com'n, supra.*

So the chancellor was in error in ruling that these tax sales were void and that the liens for 1940 city, county and state advalorem taxes were extinguished when the Commission purchased from the Tuttle heirs an easement for right-of-way purposes on October 5, 1940.

The tax sales of September 15, 1941, for the unpaid 1940 city, county and state advalorem taxes being valid, subsequent tax deeds issued pursuant thereto conveyed to the grantees therein all rights and title remaining in the Tuttle heirs.

Pine Belt Land Company, through mesne conveyances, having acquired all rights and title acquired by the purchasers at the tax sale of September 15, 1941, is now the owner of fee simple title to Lots 9 through 12, Block 6, West End Addition to the City of Hattiesburg, Mississippi, subject only to the easement rights for right-of-way purposes purchased by the State Highway Commission from the Tuttle heirs on October 5, 1940.

The decree of the lower court is reversed insofar as it:

1. Dismissed the First Amended Cross-bill of Pine Belt Land Company;

2. Found that the Commission had acquired fee simple title to the four Tuttle lots by adverse possession under color of title and thus confirmed title in the Mississippi State Highway Commission, and cancelled of record any and all purported conveyances from and after October 5, 1940, insofar as such conveyances related to the title of the Commission; and

3. Found that the City, and County and State tax sales of the four lots in question on September 15, 1941, for 1940 advalorem taxes thereon were void and of no force and effect.

Pine Belt Land Company is found to be the owner of fee simple title to the four Tuttle lots (the lands in dispute), subject only to the easement for right-of-way purposes in and over the surface of these four lots acquired by the Commission from the Tuttle heirs by deed dated October 5, 1940.

In all other respects, not inconsistent with this opinion, the decree of the lower court is affirmed.

Court costs both in the lower court and this Court will be assessed: One-fourth against Hattiesburg Realty Company; One-fourth against the State Highway Commission; One-fourth against Pine Belt Land Company; and One-fourth against the Curries and Cloverleaf Mall, Ltd.

AFFIRMED IN PART, REVERSED IN PART AND RENDERED.

PATTERSON, C. J., SMITH, P. J., and SUGG, WALKER, BROOM, LEE, BOWLING and HAWKINS, JJ., concur.

West Key Number System

APPENDIX C

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THIS CASE

MISSISSIPPI CONSTITUTION

Section 79. The legislature shall provide by law for the sale of all delinquent tax lands. The courts shall apply the same liberal principles in favor of such titles as in sale by execution. The right of redemption from all sales of real estate, for the nonpayment of taxes or special assessments, of any and every character whatsoever, shall exist, on conditions to be prescribed by law, in favor of owners and persons interested in such real estate, for a period of not less than two years.

SOURCES: 1869 art XII §8.

Section 17. Private property shall not be taken or damaged for public use, except on due compensation being first made to the owner or owners thereof, in a manner to be prescribed by law; and whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be public shall be a judicial question, and, as such, determined without regard to legislative assertion that the use is public.

SOURCES: 1817 art I §13; 1832 art I §13; 1869 art I §10.

Vol. 1 Mississippi Code of 1930, p. 1408.

3120. Taxes, a lien, from what date. – Taxes, both state and county, assessed upon lands or personal property, shall bind the same, and be entitled to preference over all judgments, executions, encumbrances, or liens, whensoever created; and all taxes assessed shall be a lien upon and bind

the property assessed, from the first day of January of the year in which the assessment shall be made; and no property shall be exempt from distress and sale for taxes. And it shall not be necessary to the validity of an assessment, or of a sale of land for taxes, that it shall be assessed to its true owner; but the taxes shall be a charge on the land or personal property taxed, and the sale shall be a proceeding against the thing sold, and shall vest title in the purchaser, without regard to who may own the land or other property when assessed or when sold, or whether wrongfully assessed, either to a person, or to the state, or any county, city town, or village, or subdivision of either.

1928 Ex. Ses. ch. 15; 6886; 4255; 3746; 1884 p. 16; 470; 1665; Ch. 3 art. 12; Ch. 8 art. 9 (18).

Vol. 1 Mississippi Code of 1930, p. 1425

3161. When assessment rolls filed – board may extend time. – The assessor shall complete the assessment of both real and personal property and file the roll or rolls with the clerk of the board of supervisors on or before the first Monday in July of each year. He shall make an affidavit and append it to each roll, showing that he has faithfully endeavored to ascertain and assess all the persons and property in his county; that he has not omitted any person or thing, or placed upon, or accepted an undervaluation of any property, through fear, favor, or partiality, and that he has required every taxpayer to make the oath required to be taken by the person rendering a list of his taxable property wherever possible; and the assessor shall file with the rolls, under oath, a list showing the name of every taxpayer who has failed or refused to make oath to his tax lists. If the assessor fails to file his roll, or rolls, on or before the first Monday in July of each year the board of supervisors at its July meeting shall adopt an order showing the failure of the assessor to file his roll, or rolls, and shall certify to the

state tax commission a statement showing such failure and the time necessary for the assessor to complete his roll, or rolls. Upon receipt of such certificate from the board of supervisors of any county, the state tax commission shall, by order entered on its minutes, provide when such roll shall be completed and filed, and the date when the board of supervisors shall meet to equalize the roll, or rolls, and the time when objections to the assessments contained in such roll, or rolls, shall be heard by the board of supervisors, provided that not less than ten days' notice shall be given prior to the hearing of such objections. When such roll, or rolls, shall be filed they shall be dealt with in all respects as now provided by law except as to the time.

1926 ch. 213; 7769al; 1920 ch. 323.

VOL. 1 Mississippi Code of 1930 p. 1427

3164. What to be done. – At the meeting for the equalization of assessments, the board of supervisors shall carefully examine the roll or rolls, and shall then and there cause to be assessed any person or thing that may be found to be omitted, and anything found to be undervalued may be correctly valued. And in the year in which the land assessment is made the board shall carefully examine the land roll and see that it embraces all the land in the county, and correctly represents it as being the property of individuals or the state or United States, according to the fact, and taxable or not taxable according to law, and that all is correctly described so as to be identified with certainty, and that there are no double assessments; and all land improperly omitted from the roll shall be added thereto by the board or under its direction, and land incorrectly or insufficiently described shall be properly described, and land which is not classed correctly or undervalued shall be properly classified and valued. And the board shall cause

all corrections to be made in the rolls, which, being done, the board shall enter an order approving the assessments, with or without corrections, as the case may be, subject to the right of parties in interest to be heard on objections as hereafter provided.

6939; 4305; 3793; 505.

Vol. 1 Mississippi Code of 1930, p. 1428

3166. Objections must be filed or assessment to stand. – A person who is dissatisfied with the assessment may, at such August meeting, present objections thereto in writing which shall be filed by the clerk and docketed and preserved with the roll. All persons who fail to file objections shall be concluded by the assessment and precluded from questioning its validity after its final approval by the board of supervisors or by operation of law, except minors and persons non compos mentis.

7769el; 1920 ch. 323.

Vol. 1 Mississippi Code of 1930, p. 1430

3172. How assessment approved. – Assessments must be approved by an order of the board of supervisors entered on the minutes; but the failure to make and enter such order shall not vitiate the assessment if it shall appear that the assessment was made according to law.

6940; 4306; 3794.

Vol. 7A Mississippi Code of 1942, p. 183.

§9935. Lists made – vests title in state or purchaser. – The tax collector shall on or before the second Monday of May and on or before the second Monday of October of each year, transmit to the clerk of the chancery court of the county separate certified lists of the lands struck off by him to the State and that sold to individuals, specifying to whom assessed, the date of sale, the amount of taxes for which sale was made, and each item of cost incident thereto, and where sold to individuals, the name of the purchaser, such sale to be separately recorded by the clerk in a book kept by him for that purpose. All such lists shall vest in the State or in the individual purchaser thereof, a perfect title to the land sold for taxes, but without the right of possession for the period of and subject to the right of redemption; but a failure to transmit or record a list, or a defective list shall not affect or render the title void. If the sheriff or clerk shall fail to perform the duties herein prescribed, he shall be liable to the party injured by such default in the penal sum of twenty-five dollars, and also on his official bond for the actual damages sustained. The lists hereinabove provided shall, when filed with the clerk, be notice to all persons in the same manner as are deeds when filed for record. The lists of lands hereinabove referred to shall be filed by the sheriff in May for sales made in April and in October for sale made in September, respectively.

SOURCES: Laws, 1934, ch. 188.

ARTICLE I, Section X, clause 1, Vol. 1, Mississippi Code of 1972, page 34.

Section X

1. No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

28 USCS, Section 1257, page 586.

§1257. State courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statues of, or commission held or authority exercised under, the United States.

For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals. (June 25, 1948, c. 646 §1.62 Stat. 929; July 29, 1970, P. L. 91–358, Title I, Part D, Subpart 2, §172(a) (1), 84 Stat. 590.)

Amendment XIV, Section 1, Vol. 1, Mississippi Code of 1972, page 110.

Amendment XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws.

APPENDIX D

UNITED STATES OF AMERICA,

Plaintiff,

v.

STATE OF ALABAMA.
(313 US 274–283)

Taxes, §85 - lands of United States.

1. Lands owned by the United States cannot be taxed by a state.

Constitutional Law, §588 - due process - inchoate lien for taxes - subsequent mortgagees and purchasers.

2. A state statute creating an inchoate lien as of the tax day for taxes to be assessed during the year is not unconstitutional as against subsequent mortgagees and purchasers acquiring an interest in the land after the tax day but before the perfecting of the tax lien by final assessment of the tax.

Taxes, §223 - inchoate lien - property subsequently acquired by United States.

3. An inchoate lien imposed by a state statute as of the tax day for taxes to be assessed during the year is valid as against the United States, where it acquires the property after the tax day, through before the perfecting of the lien by final assessment of the tax.

85 L ed 1327

Texas, §242 - United States, §101 - consent to enforcement of taxes.

4. A tax lien cannot be enforced against the United States without its consent.

Taxes §223 - inchoate lien - when effective.

5. An inchoate lien created by statute "from and after" the tax day for taxes to be assessed during the year is effective from the moment the tax day begins, and is applicable, as against the purchaser, to lands conveyed on that day.

Taxes §258 - United States, §101 - sale for taxes - consent of United States.

6. The sale of land for taxes after it has been acquired by the United States is void in the absence of its consent to the sale.

United States, §106 - proceeding against property of.

7. A proceeding against property in which the United States has an interest is a suit against the United States.

[No. 12, Original.]

Argued April 28, 1941. Decided May 26, 1941.

Original Proceeding by the United States against a state to quiet its title to land against which the state asserts tax liens and claims an interest by reason of tax sales and certificates of purchase issued to it. Complaint dismissed, but decree entered setting aside tax sales and certificates of purchase.

Assistant Attorney General Norman M. Littell, of Washington, D. C., argued the cause, and, with Attorney General Robert H. Jackson and Solicitor General Biddle, also of Washington, D. C. filed a brief for plaintiff:

Since the lands were acquired before the time when the completion of levy and assessment the amounts of state taxes had been ascertained, they are not subject to liens for the taxes.

Perry County v. Selma, M. & M.R. Co. 58 Ala 546, 559, 560; Elyton Land Co. v. Birmingham, 89 Ala 477, 480, 481, 7 So. 901; New York v. Weaver, 100 US 539, 545, 546, 25 L ed 705, 707; 3 Cooley, Texation, 4th ed. 1924, §§ 1012, 1015, 1043, 1045, 1135; New York v. Maclay, 288 US 290, 292, 293, 77 L ed 754, 756, 757, 53 S Ct.323; Kern v. Towsley, 45 Barb (NY) 150, 152; Dowdney v. New Yord, 54 NY 186, 188; Hallinger v. Zimmerman, 63 NJ Eq 100, 102, 103, 51 A 936; Buckhout v. New York, 176 NY 363, 369, 68 NE 659; Territory use of Devine v. Perrin, 9 Ariz 316, 320, 83 P 361; State v. Snohomish County, 71 Wash 320, 323, 128 P 667; Gilmor v. Dale, 27 Utah 372, 377, 75 P 932; State v. Farmer, 94 Tex 232; 235, 59 SW 541; Bannon v. Burnes (CC) 39 F 892, 898; Portland v. Mulnomah County, 135 Or 469, 473, 296 P 48; United States v. Pierce County (DC) 193 F 529, 532, 533; United States v. Buffalo (CCA 2d) 54 F(2d) 471, 474, writ of certiorari denied in 285 US 550, 76 L ed 940, 52 S Ct 406; United States v. Certain Land (DC) 29 F Supp 92, 96; 3 Cooley, Taxation, 4th ed. 1924, §§1232, note 13, pp. 2454, 2455; annotation in 48 LRA (NS) 708–712.

The property of the United States is not subject to state taxation.

Van Brocklin v. Tennessee (Van Brocklin v. Anderson) 117 US 151, 179, 180, 29 L ed 845, 854, 855, 6 S Ct 670; Clallam County v. United States, 263 US 341, 345, 68 L ed 328, 331, 44 S Ct. 121; Lee v. Oscola & L. R. Road Improv. Dist. 268 US 643, 645, 69 L ed 1133, 45 S Ct 620; John R. & Catherine S. Mullen Benev. Corp. v. United States, 290 US 89, 94, 95, 78 L ed 192, 195, 196, 54 S Ct

38.

It is equally plain that the Alabama lien statute, § 372, did not per se make the lands liable for taxes. It neither fixes rates of taxation nor enumerates subjects of taxation. It does not impose taxes but secures their payment.

Heine v. Levee Comrs. 19 Wall, (US) 655, 659, 22 L ed 223, 225; Gaston v. Reconstruction Finance Corp. 237 Ala 111, 112, 185 So 893; Lewis v. Burch, 215 Ala 20, 21, 108 So. 854; Laney v. Proctor, 236 Ala 318, 320, 182 So 37; Re Opinions of Justices, 234 Ala 358, 175 So 690; New York v. Maclay, 288 US 290, 294, 77 L ed 754, 757, 53 S Ct 323.

A declaration of lien like that of the Alabama statute imposes no liability upon property when, before ascertainment of taxes, the power to tax is lost by reason of acquisition of the property by a state or one of its political subdivisions.

State v. Snohomish County, 71 Wash, 320, 322–326, 128 P 667; Portland v. Multnomah County, 135 Or 469, 473, 296 P 48; Laurel v. Weems, 100 Miss 335, 340, 341, 56 So 451, Ann Cas 1914A 159; Gillmor v. Dale, 27 Utah 372, 377, 75 P 932; State ex rel. Hinson v. Nickerson, 99 Neb 517, 520, 156 NW 1039; Denver v. Tax Research Bureau, 101 Cocl 140, 144 et seq., 71 P (2d) 809; United States v. Pierce County (DC) 193 F 529; McHenry Baptist Church v. McNeal, 86 Miss 22, 26, 38 So 195; People ex rel. McCullough v. Ladies of Loretto, 246 Ill 403, 405, 92 NE 908; Comanche County v. Central Baptist Church, 136 Okla 99, 100–102, 276 P 726, 63 ALR 1327.

Messrs. J. Edward Thornton and John W. Lapsley, both of Montgomery, Alabama, argued the cause, and, with Mr. Thomas S. Lawson, Attorney General of Alabama,

filed a brief for defendant.

The existence of tax liens to secure the payment of ad valorem taxes is to be determined by the law of the state where the tax and lien are imposed.

Am. Law Inst. Restatement, Conflict of Laws, §230; 11 Am Jur 341, Conflict of Laws, §46; Hefner v. Northwestern Mut. L. Ins. Co. 123 US 747, 31 L ed 309, 8 S Ct 337; Hussman v. Durham, 165 US 144, 41 L ed 664, 17 S Ct 253; Paddell v. New York, 211 US 446, 53 L ed 275, 29 S Ct 139, 15 Ann Cas 187; Orvis v. Powell, 98 US 176, 177, 25 L ed 238, 239; Brine v. Hartford F. Ins. Co. 96 US 627, 633, 634, 24 L ed 858, 860, 861; Cordova v. Hood, 17 Wall. (US 1, 5, 21 L ed 587, 588; Thompson v. Fairbanks, 196 US 516, 522, 49 L ed 577, 584, 25 S Ct 306, 13 Am Bankr Rep 437; Knapp, S & Co. Co. v.McCaffrey, 177 US 638, 44 L ed 912, 20 S Ct 824; The Winnebago (Iroquois Transp. Co. v. DeLaney Forge & I. Co.) 205 US 354, 360, 51 L ed 836, 839, 27 S Ct 509; Martin v. West, 222 US 191, 196, 56 L ed 159, 161, 32 S Ct 42, 36 LRA (NS) 592.

Not only is the status of liens determined by the law of the situs, but the construction of tax statutes is a matter peculiarly governed by the varying statutes, and decisions construing the same, of the states where the land is situated.

Games v. Stiles, 14 Pet (US) 322, 328, 10 L ed 476, 479; Witherspoon v. Duncan, 4 Wall. (US) 210, 217, 18 L ed 339, 342; Lewis v. Monson, 151 US 545, 549, 38 L ed 265, 266, 14 S Ct 424; Lane County v. Oregon, 7 Wall. (US) 71, 74, 19 L ed 101, 103.

In the nature of things, there is no objection to the creation of a statutory lien to secure the payment of taxes the amount of which is not ascertained.

Osterberg v. Union Trust Co. 93 US 424, 23 L ed 964; Re Knox-Powell-Stockton Co. (CCA 9th) 100 F(2d) 979, 983, 38 Am Bankr Rep (NS) 766; Bates v. Archer (CCA 6th) 288 F 182–184, 2 Am Bankr Rep (NS) 580; San Diego County v. Riverside County, 125 Cal 495, 500, 58 P 81; Santa Monica v. Las Angeles County, 15 Cal App 710, 712, 115 P 945; Escondido v. Escondido Lumber, Hay & Grain Co. 8 Cal App 435, 439, 97 P 197; State v. Northwestern Teleg. Exch. Co. 80 Minn 17, 21, 82 NW 1090; Wood v. McCook Waterworks Co. 97 Neb 215, 219, 149 NW 417, LRA1915C 125; Dallas County v. Timberlake, 54 Ala 403, 412; Knighton v. Curry, 62 Ala 404, 407; Turner v. Teague, 73 Ala 554, 556; Lott v. Mobile County, 79 Ala 69, 74, 75; Schussler v. Dudley, 80 Ala 547, 549, 2 So 526, 60 Am Rep 124; Baker v. Schuessler, 85 Ala 541, 543, 5 So 328; Colt v. Barnes, 64 Ala 108, 122; Scott v. Renfro, 106 Ala 611, 614, 14 So 556; Arbuthnot v. Thatcher, 237 Ala 593, 595, 596, 188 So 245; Hartman v. Bean, 99 US 393, 397, 398, 25 L ed 455–457.

The statutory tax lien of the state, even though inchoate, at the time of the purchase or taking of the property by the United States, constituted a right protected under the Fifth Amendment to the Constitution of the United States.

Wayne County v. United States, 53 Ct Cl (F) 417, 423, 424, affirmed in 252 US 574, 64 L ed 723, 40 S Ct 394; Bedford v. United States (CCA 1st) 23 F(2d) 453, 455, 56, ALR 360; United States v. Wheeler Twp. (CCA 8th) 66 F(2d) 977, 980; Stockton v. Baltimore & N. Y. R. Co. (CC) 32 F 9, 1 Inters Com Rep 411.

The law recognizes no fraction of a day.

Hill v. Bacon, 110 Mass 387, 388; Arnold v. United States, 9 Cranch (US) 104, 119, 120, 3 L ed 671, 676; Wood v. Fort, 42 Ala 641, 642; Turnipseed v. Jones, 101 Ala 593, 595,

596, 14 So 377; Beck v. Johnson, 235 Ala 324, 179 So 225,

Mr. Chief Justice Hughes delivered the opinion of the Court:

The United States brought this suit to quiet its title to land in Macon County, Alabama. The complaint alleges that the State of Alabama is asserting liens as attaching to the land on October 1, 1936, for state and county taxes for the tax year 1937; and further that the State claims an interest in the land by reason of tax sales and the issue to the State of certificates of purchase. The Government asks a decree declaring the liens, tax sales and certificates of purchase to be invalid and enjoining the State from asserting its claims. The case was heard on bill and answer.

There are three tracts involved, which were conveyed by the owners to the United States on October 1, 1936, December 10, 1936, and March 10, 1937, respectively.

The applicable statute of Alabama [1] provides that "From

1/ Section 372, Act No. 194, General Acts Alabama, 1935, p. 566, is as follows:

"From and after the first day of Octoberof each year, when property becomes assessable the State shall have a lien upon each and every piece or parcel of property owned by any taxpayer for the payment of all taxes which may be assessed against him and upon each piece and parcel of property real or personal assessed to owner unknown which lien shall continue until such taxes are paid, and the county shall have a like lien thereon for the payment of the taxes which may be assessed by it: and if such property is within the limits of a municipal corporation such municipal corporation shall have a like lien thereon for the payment of the taxes which may be assessed by it. These liens shall be superior to all other liens and

and after the first day of October of each year,

*[278]

*When property becomes assessable the State shall have a lien upon each and every piece or parcel of property owned by any taxpayer for the payment of all taxes which may be assessed against him . . . which lien shall continue until such taxes are paid." The county is to have a like lien for taxes assessed by it. These liens are made superior to all other liens and may be enforced by sale as provided in the Act.

Under the statute, the process of assessment for the tax year 1937 began on October 1, 1936. The grantors in the above mentioned conveyances, as the respective owners on that date, made their returns and in due course the tax assessor listed and valued the several tracts [2]

*[279]

His *valuations were certified as provided by the statute to the county board of review, which by virtue of its authori-

---

1/ Continued

shall exist in the order named and each of such liens may be enforced and foreclosed by sale for taxes as provided in this Act or as other liens upon property are enforced."

The State also cites §8874 of Article 6, chap. 314, of the Code of Alabama, 1923,which provides:

"From and after the first day of October of each year, the state shall have a prior lien upon each and every piece or parcel of property real or personal, for the payment of any and all taxes which may be assessed against the owner, or upon such property, during that year, for the use of the state; and the county shall have a like lien thereon for the payment of the taxes which may be assessed against such owner, or upon such property, during that year, for the use of the county; and these liens shall exist as to all lands bid in by the state at tax sales for the annual taxes thereafter assessed on the value of the property so purchased, in the event of the tax title failing."

2/ Act No. 194, General Acts Alabama, 1935 §29, p. 274.

ty to fix valuations, made the definitive assessments.[3] It appears that the board of review met on March 8, 1937, and adjourned on March 20, 1937. It also appears that the rate for state taxes had been fixed by the statute [4] and the rate for county taxes was set on February 8, 1937, under the authority given to the court of county commissioners.[5] The school district tax was approved by the electors of the school district at an election held on June 14, 1937. The taxes for the year 1937 became payable on October 1, 1937, and became delinquent on January 1, 1938. 6 Proceedings were then instituted in the county court for the sale of the lands, and under its decrees the sales took place on June 12, 1939. The lands were sold to the State and certificates of purchase were issued accordingly.

First. The Government, invoking the principle that lands owned by **[Headnote 1]** the United States cannot be taxed by a State (Van Brocklin v. Tennessee (Van Brocklin v. Anderson) 117 US 151, 29 L ed 845, 6 S Ct 670) contends that the asserted liens are without validity because at the time the tracts were acquired by the United States the amount of the taxes had not been ascertained, as the values had not then been assessed and the rates of taxation had not been fixed. Therefore it is said that the taxes had not then been imposed. The argument is that the Alabama tax statute does not "impose taxes" but "sucures their payment" and that unless taxes are imposed the statute has no effect. The lien, it is urged becomes "fixed and final" only when the taxes have been ascertained "by completion of levy and assessment."

3/ Id §§ 50, 72, pp. 284, 292.
4/ Id. §7, p. 263.
5/ Id. § 64, p. 288.
6/ Id §11, p. 267.

There is no question however, as the Government concedes, that the state statute purports to impose a

*[280]

lien as *of October 1, 1936, for the taxes which by the process of assessment were to become payable for the tax year 1937. October first is fixed as the tax day, and as of that day owners are to make their returns, values are to be fixed and the taxes laid. There is no question that the State thus undertakes to create an inchoate lien upon the lands as of the tax day, a lien which is to be effective for the amount of the taxes for the ensuing year as these are fixed by the defined statutory method. This lien by the state law is made effective [Headnote 2] not only as against the owners on the tax day but also as against subsequent mortgages and purchasers. "It follows the land in the hands of the vendee, all persons being chargeable with a knowledge of its existence." Driggers v. Cassaday, 71 Ala 529, 534, See also Swann v. State, 77 Ala 545; State v. Alabama Educational Foundation, 231 Ala 11, 16, 163 So 527. We find nothing in the Federal Constitution which invalidates such a statutory scheme. Subsequent lienors and purchasers have due notice of the tax liability imposed as of the tax day and of the process of assessment, and that liability, when its amount is definitely ascertained, relates back to the day specified. We recognized the validity of such a provision in New York v. Maclay, 288 US 280, 292, 77 L ed 754, 756, 53 S Ct 323, where we observed that a tax lien created in a similar manner under a statute of New York "is effective for many purposes though its amount is undetermined. It is notice to mortgagees or purchasers, who are held to loan or purchase at their own risk if they take their mortgages or deeds before the tax has been assessed or paid." The precise decision in that case allowing priority to the United States under Rev. Stat. § 3466, 31 USCA §191, for debts due by an insolvent corporation over claims of the State for franchise taxes due but not assessed or liquidated until after a receivership, in no way detracted from

the recognition of the effectiveness of the state law creating a lien as against mortgagees and purchasers. As the

*[281]

court said, *Against mortgagees and purchasers a lien perfected afterwards may take effect by relation as of the date of the inchoate lien through which mortgagees and purchasers become chargeable with notice." Id. 288 US p. 293, 77 L ed 756, 53 S Ct 323. See also Osterberg v. Union Trust Co. 93 US 424, 425, 428, 23 L ed 964, 965; New York v. Tax & A. Comrs. 104 US 466, 468, 26 L ed 632, Compare Shotwell v. Moore, 129 US 590, 598, 32 L ed 827, 829, 9 S Ct 362. The lien in such a case, though inchoate on the day specified, and maturing when the extent of liability is ascertained by the statutory process, is similar in that respect, as the court said in the Maclay Case, to the lien of a transfer tax or duty upon the estate of a decedent which is effective although the amount is ascertained after death.

Our present inquiry is whether, assuming the validity of the state statute creating a lien [Headnot 3] as of October 1, 1936, as against other subsequent purchasers, it should be deemed invalid as against the United States. The question is not whether such a lien could be enforced against the United States. The fact that the United States had taken title [Headnote 4] and that proceedings could not be taken against the United States withoug its consent would protect it against such enforcement. But that immunity would not be predicated upon the invalidity of the lien. If in this instance title had been taken by the United States in the summer of 1937 after the amount of the taxes had been ascertained and the respective liens were concededly valid, still proceedings against the United States could not be prosecuted without its consent.

The Government is not content with that measure of protection. The Government brings this suit in the view that

it is entitled to have a marketable title and it seeks to remove the liens in question as clouds upon that title which would interfere with disposition of the lands in the future. From that standpoint the Government asks a decree declaring the invalidity of the liens and enjoining the State from asserting

*[282]

any claim in the lands *either adverse to the United States or to its successors in title. We think that the United States is not entitled to that relief. The United States took the conveyances with knowledge of the state law fixing the lien as of October 1st. That law in creating such liens for the taxes subsequently assessed in due course and making them effective as against subsequent purchasers did not contravene the Constitution of the United States and we perceive no reason why the United States, albeit protected with respect to proceedings against it without its consent should stand, so far as the existence of the liens is concerned, in any different position from that of other purchasers of lands in Alabama who take conveyances on and after the specified tax date. It is familiar practice for grantees who take title payment of taxes and the Government could easily have protected itself in like manner. Finding no constitutional infirmity in the state legislation, we think that the liens should be held valid.

We make no exception of the tract conveyed to the United States on the tax day, October 1, [Headnote 5] 1936, as we think the state statute, as contended by the State is to be deemed effective from the moment the tax day began. See Beck v. Johnson, 235 Ala 323, 324, 179 So 225.

Second. - With respect to the tax sales the case has a different aspect. The proceedings in the [Headnote 6] county court for the sale of the lands were taken and the

decrees were rendered after the United States had become the owner of the tracts. A proceeding against property in which the [Headnote 7] United States has an interest is a suit against the United States. The Siren, 7 Wall. (US) 152, 154, 19 L ed 129, 130. The United States was an indispensable party to proceedings for the sale of the lands, and in the absence of its consent to the prosecution of such proceedings, the county court was without jurisdiction and its decrees, the tax sales and the certificates of purchase issued to the State were void. Minnesota v. United States, 305 US 382, 386, 83 L ed 235, 240, 59 S Ct 292.

*[283]

While *pleading to the contrary in its answer, the invalidity of the tax sales is now conceded by the State.

The United States is entitled to a decree setting aside the tax sales and the certificates of purchase, and in other respects the complaint is dismissed.

It is so ordered.

Opposition

NO. 81-1668

Supreme Court, U.S.
FILED
APR 23 1982
ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

PINE BELT LAND COMPANY,
Petitioner

HATTIESBURG REALTY COMPANY,
Co-Petitioner

VERSUS

MISSISSIPPI STATE HIGHWAY COMMISSION
and
MRS. TERRY ANDERSON CURRIE,
OVERTON A. CURRIE, DANIEL McMAHON
CURRIE, EDWARD ALEXANDER CURRIE, JR.,
CLOVERLEAF MALL, LTD., a Limited Partnership
Respondents

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF MISSISSIPPI

BRIEF OF RESPONDENTS TO PETITION FOR WRIT OF CERTIORARI

Bill Allain, Attorney General
State of Mississippi
Frank E. Shanahan, Jr.
Assistant Attorney General
Moran M. Pope, Jr.
(Counsel of Record)
Special Assistant Attorney General
Post Office Box 1463
Hattiesburg, Mississippi 39401
Telephone (601) 544–2491
Attorneys for Respondents
Mississippi State
Highway Commission

J. B. Van Slyke, Jr.
George G. Currie, Jr.
Frank D. Montague, Jr.
(Counsel of Record)
Post Office Drawer 1975
Hattiesburg, Mississippi
34901
Telephone (601) 544–1234
Attorneys for Respondents
Overton A. Currie, et al

QUESTIONS PRESENTED

It is submitted that THE QUESTIONS PRESENTED FOR REVIEW set out by Petitioners in their Petition-Brief identify no federal or constitutional question for review by this Court. Thus there are not any appropriate or reviewable matters presented to the Court by Petitioners. In essence, only the following questions are presented.

1. Is the case of United States of America v. State of Alabama, infra, applicable to this case, and if so,

2. Should this Court hold that that case controls over the Mississippi cases and statutes applied by the Mississippi courts, thus setting aside the Mississippi case law and the applicability of the Mississippi statutes?

3. Whether this Court will interpret the facts and statutes of Mississippi so as to decide the ultimate issue raised by Petitioners: Was the right-of-way Easement estate of the Mississippi Highway Commission in the Tuttle lands exempt from the Forrest County tax sale, so that Petitioner Pine Belt purchased at the tax sale a fee simple title, but subject to the Easement of the Mississippi State Highway Commission?

4. Whether the Easement acquired by the Mississippi State Highway Commission was exempt from the subsequent tax sale.

TABLE OF CONTENTS

Page

Questions Presented i

Statement of the Case 1

Reasons for Denying Petition 3

Argument 5

A. The Case of United States of America vs. Alabama, Supra, is Not Applicable to This Case; But if so, It is Favorable to This Respondent, Not Petitioner. 5

B. The Mississippi Statutes and Law are Applicable to This Case, Rather Than the Case of United States of America vs. Alabama, Supra 6

Conclusion 11

Brief of Respondents, Mrs. Terry Anderson Currie, Overton A. Currie, Daniel McMahon Currie, Edward Alexander Currie, Jr., and Cloverleaf Mall, Ltd. A Limited Partnership to Petition for Writ of Certiorari 12

Proof of Service - - Certificate by Bar Member 14

TABLE OF AUTHORITIES

Page

Cases:

Alvis v. Hicks, 116 So. 612 (Miss. 1928) 3, 10

City of Laurel v. Weems, 100 Miss. 335, 56 So.2d 451 (1911) 3, 8, 10

City of Meridian v. Phillips, 65 Miss. 362, 4 So. 119 (1888) 3, 7

Davis v. City of Biloxi, 184 So. 76 .....3, 10

Richton Tie and Timber v. McWilliams, 67 So.2d 374 (Miss. 1953) 3, 10

State Highway Commission v. Casey, 178 So.2d 859 (1965) 3, 10

United States of America v. State of Alabama, 313 U.S. 274, 85 L.Ed. 1327, 61 Ct.P. 1011 .....5, 6

Statutes:

Section 468, Mississippi Code of 1880 3

Section 3108, Mississippi Code of 1930 .....3, 7, 8

NO. 81–1668

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

PINE BELT LAND COMPANY,
Petitioner

HATTIESBURG REALTY COMPANY,
Co-Petitioner

VERSUS

MISSISSIPPI STATE HIGHWAY COMMISSION
and
MRS. TERRY ANDERSON CURRIE,
OVERTON A. CURRIE, DANIEL McMAHON
CURRIE, EDWARD ALEXANDER CURRIE, JR.,
CLOVERLEAF MALL, LTD., a Limited Partnership,
Respondents

BRIEF OF RESPONDENT MISSISSIPPI STATE HIGHWAY COMMISSION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Petitioner and Co-Petitioner filed suit in the Chancery Court of Forrest County, Mississippi, to remove alleged clouds from property (for convenience referred to throughout the litigation in the State courts as the Tuttle property), and to confirm title in such property in either the Petitioner or Co-Petitioner, who were separate corporations but having common stockholders and the same beneficial interest.

The Mississippi Supreme Court, after Petition for Rehear-

ing, entered its final judgment that:

Confirmed fee simple title in Pine Belt, subject to an Easement of the Mississippi State Highway Commission for right-of-way purposes.

In 1940, the Mississippi State Highway Commission determined that it was in the public interest to improve U.S. Highway 49 and 11, south of Hattiesburg, for the traveling public. This would be accomplished by 4–laneing U. S. Highways 49 and 11 and constructing a cloverleaf interchange at the intersection of U. S. Highways 49 and 11. Among the right-of-way easements acquired was one from the heirs of Emma Tuttle. The warranty deed from the heirs of Mrs. Tuttle was executed on October 5, 1940, and granted unto the State Highway Commission "for right-of-way purposes":

> Lots, 9, 10, 11 and 12 in Block 6, in the D. M. Gatlins West End Addition to Hattiesburg, Mississippi.

World War II intervened, and finally in 1947 the improvement of U. S. Highways 49 and 11 and the construction of the cloverleaf interchange were completed. A large shopping center and many business establishments were constructed and developed around this cloverleaf interchange. Later a service road was constructed paralleling the ramp approach in the northeast quadrant of the interchange. While no part of the four Tuttle lots was used in the roadbed for the northeast ramp or service road, these lots have been continuously used since 1947 by the Highway Commission as a buffer zone between the service road and the shopping center. A paved four-lane entrance and exit road was constructed through the middle of this property connecting the northeast quadrant service road with the Cloverleaf Mall parking area. Two large concrete drainage culverts were constructed on the Tuttle lots. The Commission since 1947, has continuously used these lots for drainage purposes

and has regularly mowed, cleaned up, pruned trees and otherwise maintained and preserved the scenic beauty of these lots. They continue to be used as a buffer zone for the safety of the traveling public. (Part of this Statment of Case is quoted from Mississippi Supreme Court decision).

REASONS FOR DENYING PETITION

This case involves the existence of a property interest. Both the trial court and the Mississippi Supreme Court fully considered the arguments now advanced by Petitioners. The analysis and decisions of these Courts is not based upon a new principle of law, but rather statutes in continuous existence to date, and case law, all reaching back nearly 100 years. Section 468, Mississippi Code of 1880; Section 3108, Mississippi Code of 1930; *City of Meridian v. Phillips*, 65 Miss. 362, 4 So. 119 (1888); *City of Laurel v. Weems*, 100 Miss. 335, 56 So.2d 451 (1911); *Alvis v. Hicks*, 116 So. 612 (Miss. 1928): *Richton Tie and Timber v. McWilliams*, 67 So.2d 374 (Miss. 1953); *State Highway Commission v. Casey*, 178 So.2d 859 (1965); *Davis v. City of Biloxi*, 184 So.76.

The Mississippi Supreme Court correctly applied these statutes and cases to the particular facts and circumstances as were before it.

There is no departure from any precedent of this Court. Neither will a decision on this case require the Court to address new questions of law. Inasmuch as the case was decided on its own special facts, it will have no precedential effect upon other litigants or individual rights. Additionally, this case does not reflect other factors frequently relied upon by this Court in determining whether to grant certiorari, i. e., Rule 17.

Finally, there is no jurisdiction here. The only possible

material allegation in the Petition for Writ asserting grounds of jurisdiction is that:

> "or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States".

The above as quoted by Petitioner (Page 2), from *Section 1257, 28 U.S.C.S. 586, STATE COURTS; APPEAL; CERTIORARI.*

Petitioner brought all its proceedings in state courts. No statutes of the state are challenged and there is nothing "specially set out or claimed" in any pleadings asserting a "title, right, privilege or immunity" under the Constitution of either the United States or Mississippi. Petitioner, only after the trial, and in the appeal processes in the State courts, claimed and asserted constitutional deprivations, and it must be presumed that the Mississippi courts considered such arguments. Petitioners contend that Amendment IV, Section 1, Constitution of America (copies verbatim on page A–32 of Appendix to Petition) is involved in this case. It is not applicable to this case.

There are no federal questions involved in this case, and thus none to be reviewed. The only questions were Mississippi statutes. It is not asserted that the applicable Mississippi statutes are repugnant to either the United States Constitution or Federal statutes. The challenge is to the Mississippi court's interpretation and application of these Mississippi statutes, and to the case law of Mississippi followed by the Mississippi courts without deviation or modification for almost 100 years. Petitioners assert this Court should make Mississippi (and presumably "many, many other states", P. 13, Petitioners Brief) follow the case of *United*

States of America v. State of Alabama, 313 U.S. 274, 85 L.Ed. 1327, 61 Ct. P. 1011, but that case has no relevancy to the statutes, facts and circumstances of this case, as will be further set forth.

There is no jurisdiction of this case, no constitutional provision or questions, or federal questions, were raised in the proceedings except by Argument Brief of Petitioners, at which time the presumption is that the Mississippi courts addressed the same, and in any event none are present in the case.

ARGUMENT

A. THE CASE OF UNITED STATES OF AMERICA VS. ALABAMA SUPRA, IS NOT APPLICABLE TO THIS CASE; BUT IF SO, IT IS FAVORABLE TO THIS RESPONDENT, NOT PETITIONER.

United States of America v. Alabama, supra, was a case brought by the United States against a state, jurisdiction expressly lying in the Federal courts. The United States initiated the suit and sought to remove an Alabama tax lien cloud and confirm its title so that it would have a marketable title to land sold at tax sale by Alabama, to Alabama, to satisfy a tax lien, Alabama holding the tax sale certificate of purchase. The case on its face is not relevant nor applicable to the case now before the Court.

The tax lien was a lien owned by Alabama, a sovereign, and the case held that Alabama's lien was not extinguished or merged when a different sovereign, the United States of America, purchased the land after Alabama's lien had attached, but before Alabama tax sale to satisfy Alabama lien; the Court held that Alabama's lien remained in existence, even though Alabama tax sale was void, because the United

States was not a party to the tax sale and could not be sued without its consent.

In the case now before the Court, the tax lien was in favor of the State of Mississippi, a sovereign, and its arm and political subdivision, Forrest County, and when that same sovereign (though its arm and agency, the Mississippi State Highway Commission) brought an easement estate in the Tuttle property, the lien of Mississippi was extinguished as to the easement estate purchased by Mississippi. The lien of Mississippi remained as to the remaining estates in the Tuttle property, and those remaining estates were sold by Mississippi at the Mississippi tax sale a year later, to Petitioners' predecessor in title.

This Respondent paid $400.00 to the Tuttles for an Easement Deed. It was placed of record long before the tax sale, and all the world, and Petitioners' predecessor in title at the tax sale, had notice of the Easement, and when paying Mississippi at the tax sale the amount of the Mississippi tax lien, Petitioners' predecessor received a tax deed from Mississippi, but only as to the estates of this property to which Mississippi's lien attached at the time of Mississippi's tax sale.

B. THE MISSISSIPPI STATUTES AND LAW ARE APPLICABLE TO THIS CASE, RATHER THAN THE CASE OF UNITED STATES OF AMERICA VS. ALABAMA, SUPRA.

The Easement of Mississippi State Highway Commission was exempt from the tax sale, and the tax lien, as stated, was extinguished to the extent of the easement. Mississippi statute provides that the property of the state, its arms, agencies and political subdivisions are exempt from taxation. Thus,

> "Vol. 1 Mississippi Code of 1930, p. 1402: 3108 What Property Exempt. The following shall be exempt from taxation: . . .
>
> (b) all property, real or personal, belonging to the United States.
>
> (c) all property, real or personal, belonging to the state or to any county, levee board or municipal corporation thereof . . . ."

It is not permitted to sell at the courthouse steps property of the sovereign to satisfy a purported lien imposed by the sovereign on its own property.

In the very early Mississippi case of *City of Meridian v. Phillips*, 65 Miss. 362, 4 So. 119, it was said:

> "It is not disputed that the property in controversy belonged to (the City of Meridian, Mississippi) when it was attempted to be sold for taxes. Section 468 of the Code (of 1880) exempts from taxation, among other things, property belonging to the United States, or to the state, or to any county, or to any incorporated city or town in the state. Liability of property to taxation is the basis of the power to sell it for taxes; and, where property is exempt by law from taxation, it cannot be subjected thereto by any action of the board of supervisors, or the officers charged with the assessment and collection of taxes, and a sale of it for taxes under such circumstances is void."

In each succeeding Mississippi Code since 1880 to date,

the same exemption language as above cited from the Mississippi Code of 1930 is used.

The leading case in Mississippi, which is on all-fours and squarely in point, and which is quoted by the Mississippi Supreme Court in this case is City of *Laurel v. Weems*, supra. In that case *Weems* sought to quiet and confirm his alleged title to a city lot in the City of Laurel, and claimed by that city to be owned by the city. *Weems'* alleged title arose by virtue of a tax title purchased by him at a Tax Collector's sale on March 4, 1907, for 1906 taxes. On March 20, 1906, Eastman Gardner and Co. conveyed the lot by Warranty Deed to the City, and on May 17, 1906, the Deed was recorded. The tax for 1906 was not paid, and on March 4, 1907, the lot was sold for unpaid tax, and purchased by *Weems*. The property was owned by the City as an alleyway.

The trial court held the tax title valid, and confirmed the title of *Weems* against the City, the City appealed, and the Supreme Court held that since the Bill wholly failed to state a cause of action, the judgment of the Court below was reversed and the Bill dismissed.

The Mississippi Supreme Court had this to say:

> "The chief contention of (*Weems*) is that . . . the lien for taxes attached to the property on the first day of February, 1906, while the property was the subject of private ownership and liable to taxes, and that when the taxes were ascertained and became due it related back to the first day of February, 1906, and did not abate when the City purchased the same.
>
> . . .

"It is undisputed law that the general rule is that statutes granting exemptions from taxation must be strictly construed, and must not be extended beyond what the terms clearly express; but his rule of construction has no application to the property of the State, county or municipality, when it is sought to collect a tax on the property of either, or to take away their property because of a failure to pay the tax claimed, followed by a sale of same on account of the deliquency.

. . .

"Taxes are charges levied by the sovereignty state upon the persons of its subject or citizens, and not charges upon itself. Revenue is the object of taxation, and none would result from levying a tax upon the agencies of the state, through which it exercises the functions of government, or by virtue of which it protects and enforces its rights or those of its citizens. Taxation of these functions and agencies would, in effect, be merely taking out of one pocket and putting it into another. In the end, no net revenue would be derived.

. . .

"After the municipality purchased this lot, the taxing agencies could not take any further steps looking to the collection of the tax, and the subsequent sale of the land for the taxes was a nullity. The purchaser at the sale got no title,

> because it was beyond the power of the officers to sell."

The logic and reasoning of the *Weems* case has been adopted and reaffirmed by the Mississippi Supreme Court a number of times during the sixty-five (65) years since it was decided, and without modification. *Alvis v. Hicks*, supra; *Davis v. City of Biloxi*, supra, *Richton Tie and Timber v. McWilliams*, supra; *State Highway Commission v. Casey*, supra.

CONCLUSION

Respondent Commission submits that the issues in this case have been painstakingly and thoroughly tried and reviewed by the lower trial court and the highest Mississippi Appellate Court. There is no jurisdiction here, no federal question, and no further purposes would be served by providing a hearing. Accordingly, Respondent Commission urges that the Petition for Certiorari be denied.

Respectfully submitted,

BILL ALLAIN, Attorney General
State of Mississippi

FRANK E. SHANAHAN, JR.
Assistant Attorney General

MORAN M. POPE, JR.
(Counsel of Record)
Special Assistant Attorney General
Post Office Box 1463
Hattiesburg, Mississippi 39401
Telephone: (601) 544–2491

Attorneys for Respondent
Mississippi State Highway
Commission

NO. 81–1668

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

PINE BELT LAND COMPANY,
Petitioner

HATTIESBURG REALTY COMPANY,
Co-Petitioner

VERSUS

MISSISSIPPI STATE HIGHWAY COMMISSION
and
MRS. TERRY ANDERSON CURRIE, ET Al,
Respondents

BRIEF OF RESPONDENTS, MRS. TERRY ANDERSON CURRIE, OVERTON A. CURRIE, DANIEL McMAHON CURRIE, EDWARD ALEXANDER CURRIE, JR., CLOVERLEAF MALL, LTD., a Limited Partnership, TO PETITION FOR WRIT OF CERTIORARI

The Respondents Currie et al support the validly executed and legally acquired easement and right-of-way of the Respondent Mississippi State Highway Commission. These Respondents, with respect, adopt and concur in the foregoing Brief of Respondent Mississippi State Highway Commission to Petition for Writ of Certiorari.

Respectfully submitted,

J. B. Van Slyke, Jr.

George G. Currie, Jr.

Frank D. Montague, Jr.
(Counsel of Record)
Post Office Drawer 1975
Hattiesburg, Mississippi 39401
Telephone (601) 544–1234

Attorneys for Respondents,
Overton A. Currie, et al.

PROOF OF SERVICE - - CERTIFICATE BY BAR MEMBER

We, Moran M. Pope, Jr., attorney for Respondent Mississippi State Highway Commission, and Frank D. Montague, Jr., attorney for Respondents Mrs. Terry Anderson Currie, Overton A. Currie, Daniel McMahon Currie, Edward Alexander Curries, Jr. and cloverleaf Mall, Ltd., a Limited Partnership, and members of the Bar of the Supreme Court of the United States, hereby certify that on the 23 day of April, 1982, we served copies of the foregoing Brief of Respondent Mississippi State Highway Commission to Petition for Writ of Certiorari and Brief of Respondents, Mrs. Terry Anderson Currie, Overton A. Currie, Daniel McMahon Currie, Edward Alexander Currie, Jr. and Cloverleaf Mall, Ltd., a Limited Partnership to Petition for Writ of Certiorari upon counsel for Petitioner and Co-Petitioner in accordance with the law and the rules of the Supreme Court of the United States, by mailing copies in duly addressed envelopes, first-class postage prepaid, to the following representative attorneys of record:

Of Counsel for Pine Belt Land Company:

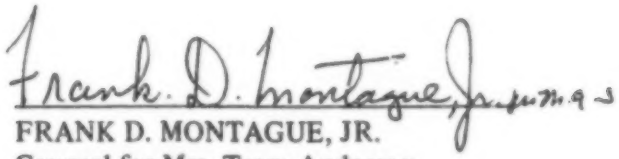
Hon. Milton A. Schlesinger
Attorney at Law
Post Office Box 869
Hattiesburg, Mississippi 39401

Of Counsel for Hattiesburg Realty Company:

Hon. Wallace R. Gunn
Attorney at Law
Post Office Drawer 1729
Hattiesburg, Mississippi 39401



MORAN M. POPE, JR.
Counsel for Mississippi State Highway Commission,
Respondent



FRANK D. MONTAGUE, JR.
Counsel for Mrs. Terry Anderson
Currie, Overton A. Currie,
Daniel McMahon Currie, Edward
Alexander Currie, Jr. and
Cloverleaf Mall, Ltd., a Limited
Partnership, Respondents

Petitioner's Reply Brief

FILED
APR 27 1982
ALEXANDER L. STEVAS
CLERK

NO. 81-1668

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

PINE BELT LAND COMPANY,
Petitioner
HATTIESBURG REALTY COMPANY,
Co-Petitioner

VERSUS

MISSISSIPPI STATE HIGHWAY COMMISSION,
and
MRS. TERRY ANDERSON CURRIE,
OVERTON A. CURRIE, DANIEL McMAHON
CURRIE, EDWARD ALEXANDER CURRIE, JR.,
CLOVERLEAF MALL, LTD., a Limited Partnership
Respondents

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF MISSISSIPPI

REPLY BRIEF TO RESPONDENTS' BRIEF IN OPPOSITION

Hon. Milton Schlesinger
Attorney at Law
P. O. Box 869
Hattiesburg, MS 39401
(601) 545-3722
Counsel for Petitioner
and
Hon. Wallace R. Gunn
Attorney at Law
P. O. Drawer 1729
Hattiesburg, MS 39401
(601) 544-2312
Counsel for Co-Petitioner

Bill Allain,
Attorney General
Frank E. Shanahan, Jr.,
Ass't. Attorney General
Moran M. Pope, Jr.
(Counsel of Record)
Special Ass't. Attorney
General
P. O. Box 1463
Hattiesburg, MS 39401
(601) 544-2491
Counsel for Respondents
Mississippi State
Highway Commission

NO. 81-1668

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

PINE BELT LAND COMPANY,
Petitioner
HATTIESBURG REALTY COMPANY,
Co-Petitioner

VERSUS

MISSISSIPPI STATE HIGHWAY COMMISSION,
and
MRS. TERRY ANDERSON CURRIE, et al,
Respondents

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF MISSISSIPPI

REPLY BRIEF TO RESPONDENTS' BRIEF IN OPPOSITION

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States.

REPLY TO RESPONDENTS' "QUESTIONS PRESENTED"

Respondents' Brief in Opposition attempts to raise new questions not pertinent to the Question raised in Pine Belt's Petition to this Court.

Although stated in three different manners on Pages i and ii of Pine Belt's

Petition, the question before the Court is:

> "What is the latest date on which a tax-exempt entity (church, state agency, etc.) may acquire an interest in land from the owner, free from a tax lien which attached to said land on the tax date as set by State statute,
>
> > to such an extent that is the taxing processes of such state are followed and the land is sold by a valid tax sale in fee simple to an individual for the nonpayment of the taxes secured by such a lien,
> >
> > > the interest in said land acquired by such a tax-exempt entity would not be affected by such tax sale?"

It is respectfully suggested the question could not be made clearer or simpler, and it is THE ONLY QUESTION which Petitioners desire to have answered.

Any other questions should have been raised by a Cross-Petition by Respondents.

TABLE OF CONTENTS

	Page
Reply to Respondents' "Questions Presented"	i
Table of Contents	ii
Table of Authorities	iv
Statement of the Case	1
Reply to Respondents' "Reasons For Denying Petition"	2
Hypothetical	4
Tax Day In Mississippi and Severance of Estates After Tax Date	7
Conclusion	8
Proof of Service	v

TABLE OF AUTHORITIES

Page

CASES:

City of Laurel v. Weems, 100 Miss. 335, 56 So. 451 (1911) 2,6

City of Meridian v. Phillips, 65 Miss. 362, 4 So. 119(1888) 2

Ex Parte Fritz, 86 Miss. 210, 38 So. 722(Miss. 1908) 3

Turner V. Beckham, 277 So.2d 110 (Miss. 1972) 8

United States of America v. State of Alabama, 313 U.S. 274, 85 L.Ed. 1327, 61 Ct.P. 1011 . . . 2,5,7

AUTHORITIES:

Amendment V, Constitution of United States, Mississippi Code of 1972, p. 83 6

Amendment XIV, Section 1, Constitution of United States, Mississippi Code of 1972, p. 110. 6

Section 3120, Mississippi Code of 1930, Laws of 1934, Chapter 199, Vol. 1, p. 1408 (Copied in full in Appendix C, A-27 of Pine Belt's Petition) . . . 7

STATEMENT OF THE CASE

The statement of the pertinent facts are found on Pages 5, 6 & 7 of Pine Belt's Petition and could not be stated clearer. The Statement of the Case by Respondents attempts to divert this Court's attention from THE QUESTION and deserved only such reply as to show the erroneous conclusions inferred: (1) Shopping center and businesses constructed in 1972. (2) The service road built in 1973. (3) Highway Commission never had authority to purchase a buffer zone, and until 1972, land where shopping center is located was a swamp. (4) No concrete drainage culverts have ever been constructed on the Tuttle lots, which are marshy with weeds and bushes growing thereon caused by the raised elevation of the parking lot of the shopping center to the North and the elevated roads to the South.

REPLY TO RESPONDENTS' "REASONS FOR DENYING PETITION" AND "ARGUMENT"

Respondents miss the question in this case. There is no doubt that once a piece of land is owned before January 1st of a year by an exempt entity it cannot thereafter be taxed. In the City of Meridian case, 65 Miss. 362, 4 So. 119 (1888), Meridian owned the land before January 1st. In the City of Laurel case, 100 Miss. 335, 56 So.2d 451 (1911), the City bought the fee title to the land after the tax day, but before any taxing process had begun. The City of Laurel case, supra, is ambiguous and not in conformity with the constitutional law of the United States as taught by this Supreme Court. In the other cases cited by respondents, the Court did not consider the fundamental constitutional issue, answered once and for all by the teachings of this Supreme Court in United States of America vs. State of Alabama, 313 U. S. 274, 85 L.Ed. 1327, 61 Ct.P.

1011 (1941).

It takes a little background to reach that constitutional issue. Counties exist in 48 of the 50 states. In Mississippi, 14 counties existed in 1817, 55 counties in 1836, and 82 counties by 1918. Mississippi's four Constitutions have designated a county governing body and placed it in the judicial branch of government. Ex Parte Fritz, 86 Miss. 210, 38 So. 722 (Miss.1908), held the legislature could delegate law-making power to the county governing body (the Board of Supervisors). The legislature of Mississippi, in statutes too numerous to cite here, has imposed on each County the duties of a separate taxing authority, distinct and apart from any other taxing authority in the state. Thus imposed is the DUTY AND RESPONSIBILITY TO MANAGE THE FISCAL AFFAIRS OF THE COUNTY, TO RAISE MONIES BY IMPOSING AD VALOREM TAXES, TO PROVIDE METHODS FOR THEIR COLLECTION, AND

BY ISSUING BONDS AND PROVIDING METHODS FOR LEVYING AD VALOREM TAXES TO RETIRE THE SAME.

As stated on Page 13 of Pine Belt's Petition, and the case cited thereat:

> "It is inconceivable to allow one tax-exempt entity (church, state agency, etc., including but not limited to the Highway Commission, which has no taxing authority) to enrich itself at the expense of the Citizens of a unit of government who rely almost entirely on their empowered taxing authority to satisfy their public obligations."

HYPOTHETICAL:

1. Yoknapatawpha County owed me $27,000 attorney's fees, and $100,000 on general obligation bonds in 1940.

2. The County could not pay either because in 1940, after January 1st, the Highway Commission bought easements on almost the entirety of the only fertile strip of land running through the County for a super highway, and the Commission refused to pay the 1940 taxes on such land.

3. Where did I go for redress? The attorney's fees and the bonds were a

contract with Yoknapatawpha County, The State Treasurer advised me that he had no authority to pay the obligations of Yoknapatawpha County. The Highway Commission told me thay had no respons-bility in the matter. My remedy was against the county.

IMPOSSIBLE? NO! Similar situations occurred many times in the great depression of 1930-34.

4. Yoknapatawpha County then sold the fee land for taxes to Pine Belt to enforce the lien which attached to the land on January 1, 1940. No exempt entity could unilaterally disrupt the power of the County to raise money from Pine Belt to pay it's debts, by diminishing it's Jan. 1st lien. County had the fee simple for sale; Pine Belt bought it.

The whole point is that this United States Supreme Court interpreted the Constition of the United States to enforce such a sale as the law of the land, in United States of America vs. State of Alabama, supra, quoted in full in Appendix

D, page A-34 through A-46 of Pine Belt's Petition.

A. In that case, this Supreme Court recited the arguments of United States of America, Plaintiff, that an inchoate lien could be disrupted, and specifically referred to the Laurel vs. Weems case, supra, and other Mississippi Cases, and THEN REJECTED SUCH ARGUMENT.

B. It also recited the argument of Alabama that such inchoate lien constituted a right protected under the 5th Amendment to the Constitution of the United States (which of course is paralleled by the 14th Amendment) and held that such argument is valid and held that such argument is NOW THE LAW OF THE LAND.

C. Alabama also argued that the determination of what rights are created by a tax lien is a state question. This Court rejected such argument by simply doing ahead and deciding not only the nature of the inchoate lien, BUT ALSO DECIDED THAT

THE ENFORCEMENT OF SUCH A LIEN IS VALID AS AGAINST ANY SOVEREIGN BUYING ON OR AFTER TAX DAY, AND STATED:

> ". . . we perceive no reason why the United States . . . SHOULD STAND, SO FAR AS THE EXISTENCE OF THE LIENS IS CONCERNED IN ANY DIFFERENT POSITION FROM THAT OF OTHER PURCHASERS OF LANDS IN ALABAMA, WHO TAKE CONVEYANCES ON AND AFTER THE SPECIFIED TAX DATE. It is familiar practice for grantees who take title in such circumstances TO SEE THAT PROVISION IS MADE FOR THE PAYMENT OF TAXES AND THE GOVERNMENT COULD EASILY HAVE PROTECTED ITSELF IN LIKE MANNER. Finding no constitutional infirmity in the state legislation, we think that the liens should be held valid. (Emphasis added)"

The only problem is that some states have not followed United States of America vs. State of Alabama, supra, and apparently NO ONE HAS BROUGHT THAT FACT TO THE ATTENTION OF THIS COURT UNTIL NOW. THIS MUST BE REMEDIED.

TAX DAY IN MISSISSIPPI AND SEVERANCE OF ESTATES AFTER TAX DATE

Section 3120 of Vol. 1, Mississippi Code of 1930, p. 1408, quoted in full on Appendix C, page A-27 and A-28 fixed the

tax day as January 1 of each year in Mississippi.

This point has most recently been addressed by the Supreme Court of Mississippi in Turner vs. Beckham, 277 So. 2d 110, (Miss. 1972) when it held that even under a void tax sale, if it later was perfected by possession of the purchaser at the tax sale, his possession would relate back to tax day of the year in which the lien attached, and in its opinion, the Mississippi Supreme Court held:

> "It follows that since the void tax sale was validated by possession, the title of Beckham related to the date the 1930 taxes became a lien on January 1, 1930, and the claim of Turner to a severed mineral interest created November 10, 1930, was cut off by the terms of the Statute. Pettis vs. Brown, 203 Miss. 292, 33 So. 2d 809 (1948)."

CONCLUSION

It is therefore respectfully concluded that a further distinction between the cases cited by Respondents is that in those cases the sovereign had purchased the fee,

where in the Pine Belt Case it had purchased only "an easement" which was created after the entire fee simple title had been assessed, without any exception. The easement which the Highway Commission claims was exempted was severed from the fee simple title after tax date and after completion of the taxing process. Highway acquired nothing.

RESPECTFULLY SUBMITTED this 26th day of April, 1982.

PINE BELT LAND COMPANY

BY: Milton A. Schlesinger

MILTON A. SCHLESINGER,
Counsel for Pine Belt
Land Company, Petitioner
P. O. Box 869
Hattiesburg, MS 39401
Telephone: (601) 544-3722

Wallace R. Gunn

WALLACE R. GUNN,
Counsel for Hattiesburg
Realty Company, Co-Petitioner
P. O. Drawer 1729
Hattiesburg, MS 39401
Telephone: (601) 544-2312

PROOF OF SERVICE--
CERTIFICATE BY BAR MEMBER

We, Milton A. Schlesinger, attorney for Petitioner Pine Belt Land Company, and Wallace R. Gunn, attorney for Co-Petitioner Hattiesburg Realty Company, Co-Petitioners herein, and members of the Bar of the Supreme Court of the United States, hereby certify that on the 26th day of April, 1982, we served copies of the foregoing Reply Brief to Respondents' Brief in Opposition upon counsel for respondents, in accordance with law and the rules of the Supreme Court of the United States, by mailing copies in duly addressed envelopes, first-class postage prepaid, to the following representative attorneys of record:

Of Counsel for Overton A. Currie, et al:

Hon. Frank D. Montague, Jr.
Gray, Montague & Pittman
Attorneys at Law
P. O. Drawer 1975
Hattiesburg, MS 39401

Hon. J. B. Van Slyke, Jr.
Attorney at Law
P. O. Box 1506
Hattiesburg, MS 39401

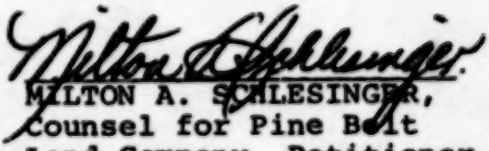
Hon. George G. Currie, Jr.
Attorney at Law
P. O. Box 626
Hattiesburg, MS 39401

Of Counsel for State Highway Commission of Mississippi:

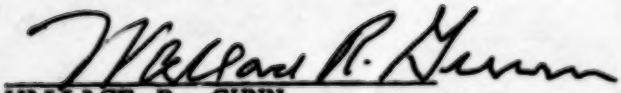
Hon. Moran M. Pope, Jr.
Special Ass't. Attorney General
P. O. Box 1463
Hattiesburg, MS 39401

Bill Allain
Attorney General
State of Mississippi
P. O. Box 1850
Jackson, MS 39205

Frank E. Shanahan, Jr.
Assistant Attorney General
State of Mississippi
P. O. Box 1850
Jackson, MS 39205



MILTON A. SCHLESINGER, JR.,
Counsel for Pine Belt
Land Company, Petitioner



WALLACE R. GUNN,
Counsel for Hattiesburg
Realty Company, Co-Petitioner